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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 592

UNITED STATES OF AMERICA, PETITIONER

v.

PEVELY DAIRY COMPANY

No. 593

UNITED STATES OF AMERICA, PETITIONER

v.

ST. LOUIS DAIRY COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General respectfully prays that writs of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on December 13, 1949.

OPINIONS BELOW

The opinion of the court of appeals (R. 650) is reported at 178 F. 2d 363. The opinion of the District Court for the Eastern District of Missouri on defendants' motions to dismiss the indictment is reported at 77 F. Supp. 853, and its opinion on

the motions of the corporate defendants for acquittal or a new trial is reported at 79 F. Supp. 12.

JURISDICTION

The judgments of the court of appeals were entered on December 13, 1949 (R. 663, 664). On January 12, 1950, the time within which to file a petition for writs of certiorari was extended by the Chief Justice to and including February 11, 1950. Motions to modify the judgments of the court of appeals were timely filed by respondents and were denied on January 26, 1950. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED

1. Whether a charge of conspiracy to fix prices in violation of the Sherman Act may be sustained on proof of price discussions between responsible agents of two competing corporations followed in each instance by identical and practically simultaneous price changes, where the corporate agents deny that their discussions resulted in agreements to fix prices.

2. Whether a jury verdict of conviction may be set aside by a court of appeals if the evidence in the light most favorable to the Government supports the verdict.

3. Whether the presumption of correctness of a jury's verdict of conviction of a defendant is dis-

pelled or weakened by simultaneous, inconsistent verdicts of acquittal of other defendants.

4. Whether admission of evidence as to the ownership of a corporate defendant and the salaries paid certain defendants constituted prejudicial error.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

> Section 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. [15 U. S. C. 1.]

STATEMENT

Respondent dairies and certain of their officers and directors were indicted on February 25, 1948, for violation of Section 1 of the Sherman Act by engaging in a conspiracy from 1938 to 1948 to fix uniform and noncompetitive retail and wholesale prices for fluid milk in the St. Louis, Missouri, area in restraint of interstate commerce (R. 4). Upon a trial by jury respondents were convicted and the individual defendants were acquitted (R. 627–628). Motions by respondents for judgments of acquittal or a new trial were denied (R. 631, 634, 637), and respondents appealed.

The court of appeals, one judge dissenting, held the verdicts unsupported by the evidence and ordered a new trial (R. 650, 662).[1]

The principal evidence for and against respondents may be briefly summarized. The two respondent dairies together make a total of some 63% of the sales of fluid milk in the St. Louis area (Gov. Ex. 31, R. 267), and more than half of the milk sold by them is produced in Illinois and shipped into the St. Louis area (Gov. Ex. 30, R. 245). During the period covered by the indictment the record reveals no instance of price competition between the two respondents in respect of Grade A milk (R. 322–323, 481).[2] On the contrary, each time that one dairy changed its wholesale or retail prices the other dairy made a simultaneous identical change (nine occasions) or an identical change not more than one day later (five occasions) (Gov. Exs. 29 (R. 241) and 32 (R. 269)).[3]

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[1] One judge was also of the view that the activities involved did not involve or affect interstate commerce.

[2] Although this statement also holds true during the period of OPA controls, we except from consideration that period, from January 19, 1943, to June 19, 1946, since the price changes during that time were withdrawn from the jury as not constituting evidence in support of the charge. 79 F. Supp. 12, 20.

[3] In the cases where changes were not simultaneous it is of interest to note that there appears to have been almost without exception a regular alternation between the respondents in being the first to make a price change (R. 269, 546–547).

From 1939 until October 1941, when the Government instituted an investigation into milk practices in St. Louis which came to the attention of respondent St. Louis Dairy (R. 254), it was the custom of Gee, the sales manager of its milk division (R. 233) and Wasser, the sales manager and a director of respondent Pevely Dairy (R. 231), to confer prior to price changes by the dairies (R. 263–264). Gee testified that from August 7, 1939, through September 2, 1941, "probably each one [price change] was announced to the other. I couldn't recall who announced to who" (R. 262). Gee denied, however, that he had ever agreed to a price change (R. 256). Wasser also testified to the exchange of information as to contemplated price changes. He stated as his reason for communicating to Gee the contemplated price action of respondent Pevely Dairy that he "knew it was impossible for us to sell at a higher price than our competitor, and I wanted to tell him what our price was, what the increase was, hoping that their company would increase their price, too" (R. 229). He admitted that in each case the hope was realized but denied that he was ever assured that it would be (*ibid.*). Both Gee and Wasser testified that they advised their respective superiors of prospective price change information received from the other (R. 228, 250). However, Lide, President and General Manager of St. Louis Dairy and a defendant in the action, denied any contemporary knowledge of the Gee-Wasser price

conferences (R. 483) and denied making any agreement to fix prices of milk (R. 479).

Although it was testified that price conferences were discontinued after October 1941 (R. 234), the pattern of simultaneous or nearly simultaneous price changes continued.[4] And on at least two occasions in 1947 price changes by the two respondents were made effective on the same day and printed price lists embodying the new prices were ordered by each dairy prior to that day.[5]

[4] The evidence shows that the same pattern of identical prices and simultaneous price changes was carried over to the matter of quantity discounts which were to be allowed wholesale purchasers of milk and other dairy products. Each appellant issued elaborate quantity discount schedules effective on February 1, 1947, providing for rebates to be allowed purchasers who within a one-month period purchased certain quantities of milk and dairy products from the seller. The schedules were identical in every respect, including the number of points to be allowed for each unit of dairy products, the scale of rebates earned according to points purchased, the limitation of the period of computation to calendar months, the provision that each separate store or place of delivery shall be considered a separate unit, and the time for payment of the rebate (Gov. Exs. 27, 28, R. 222–226). Thus every element of the prices charged by respondents was identical and all changes, either in list prices or discounts, were made simultaneously.

[5] Thus price lists were ordered on the following dates for price changes to become effective simultaneously (Stipulation, R. 546–547):

Price lists ordered		New prices effective —both dairies
St. Louis	Pevely	
July 30, 1947 Sept. 11, 1947	July 25, 1947 Sept. 15, 1947	Aug. 1, 1947 Sept. 16, 1947

Apart from the testimony of the officers of respondent St. Louis Dairy denying the making of any agreements to fix prices, the evidence for respondents consisted in the main of economic data and expert testimony designed to demonstrate that each of the price changes here involved was justified and explained by economic factors and accounting methods common to the business of both dairies, and that where there is a standardized product, such as milk, the prices in a given market will tend to be uniform and price changes will be virtually simultaneous (R. 302–561).

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred—

1. In holding, in effect, that a charge of conspiracy to fix prices in violation of the Sherman Act may not be sustained on undisputed evidence of price discussions between responsible agents of two competing corporations followed in each instance by identical and practically simultaneous price changes, where the corporate agents deny that their discussions resulted in agreements to fix prices.

2. In substituting its judgment for that of the jury in deciding what inferences should be drawn from the evidence and what evidence should be believed.

3. In holding, in effect, that a jury may not refuse to believe testimony of witnesses.

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4. In holding that the presumption of correctness usually attributed to the verdict of a jury is weakened by an inconsistency of verdicts with respect to different defendants.

5. In holding that the evidence did not sustain the verdicts of the jury.

6. In holding that there was reversible error in the admission of certain evidence.

7. In reversing the judgments of conviction.

REASONS FOR GRANTING THE WRITS

These cases present important questions in the administration of the Sherman Act and in the scope of review of jury verdicts in criminal cases.

1. In setting aside the jury's conviction of the respondents, the court below has in substance ruled as a matter of law that the pattern of concert of action by the respondents with respect to prices of milk does not constitute a conspiracy in violation of the Sherman Act. The effect of the decision below, if unreversed, would be to offer a ready device for the evasion of the antitrust laws.

The undisputed evidence favorable to the Government showed that respondent dairies have maintained identical prices, both wholesale and retail, for Grade A milk over a period of years; that all price changes made by the two dairies over a period of years, most of them increases, were made either simultaneously or within one day of each other; that prior to 1941 it was a regular

course of action for the sales representatives of the two dairies to discuss price changes to be made, with the hope and expectation that a price change made by one dairy would be followed by the other; that each dairy published elaborate and identical quantity discount schedules for wholesale purchasers, effective on February 1, 1947; and that in 1946 and 1947, there were instances in which each dairy ordered printed price lists containing identical changes in advance of a date on which both dairies put the price changes into effect (*supra,* pp. 4–6).

From the evidence, and on instructions accepted by the petitioners (R. 624) and which the court below conceded to be proper (R. 655), the jury evidently concluded that the respondents had conspired to fix the prices to be charged for Grade A milk, and it returned verdicts of guilty. In a careful opinion on motions for judgments of acquittal the district judge characterized this evidence as follows (79 F. Supp. 12, 17–18):

> One would be naive indeed to conclude, as defendants urge, that when a representative of one of the defendants initiated a conference with the other to discuss prices, under such circumstances as we set out, that the agent initiating the conference did so solely to tell his competitor's agent "We are going to raise our price on Grade A milk one and one-half cents commencing thirty-six hours hence. Goodbye." Such a message could have been transmitted by

telephone, by telegram, by an errand boy. But here the sales representatives of the two corporate defendants had to meet personally—one of the meetings was held in a public park. The meetings were prearranged.

* * * * *

Of all the dairies in St. Louis only tne two defendants could fathom with such minute exactitude as to date and amount when and in what amount the two defendants would make a price change. During the period when conferences were being held they synchronize precisely. During 1946 one day separates the price changes made by the defendants, with the defendants alternating in taking the initiative on price change. This practice ended with the year 1946. In 1947 the practice is again that of the period when representatives of each of the defendants were holding conferences on the subject. We think the comment of the court in *Davis* v. *United States,* 6 Cir., 107 F. 753, loc. cit. 755, is applicable:

"The evidence shows a detail of facts and circumstances in which the alleged conspirators are involved, separately or collectively, and which are clearly referable to a preconcert of the actors, and there is a moral probability that they would not have occurred as they did without such preconcert, that is sufficient if it satisfies the jury of the conspiracy beyond a reasonable doubt."

It seems abundantly clear that on the basis of the above evidence the jury was warranted in inferring concert of action to fix prices. The contrary decision of the court of appeals disregards, and we think is in irreconcilable conflict with, the repeated decisions of this Court that an express agreement is not an essential ingredient of a conspiracy to restrain trade—that a concert of action following a common understanding is enough. *United States* v. *Masonite Corp.*, 316 U. S. 265, 275; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 226–227; *Eastern States Lumber Assn.* v. *United States*, 234 U. S. 600, 612. Competitors need no formal arrangements in order to fix prices. A meeting at which A says "I am going to raise my price 10 cents next week" and B says "I will too" has the same consequences—economic and legal—as one in which A and B expressly agree on a price to be charged. Manifestly in the first situation A may withdraw or change his announcement if B does not make a similar one. Or, more realistically, the price change which results from the interchange of information will be the product of a common understanding, whatever forms may be followed at the meeting. Certainly that is what occurred here. During the period (from 1939 to 1941) when price conferences were held there invariably resulted simultaneous or nearly simultaneous identical price changes (*supra*, pp. 4–5).

It seems clear that the provisions of Section 1 of the Sherman Act prohibiting conspiracies in restraint of trade would in many situations be converted into little more than a pious admonition if the instant decision correctly stated the law.

2. The decision below is in conflict both with the decisions of this Court, and those of almost every other circuit, with respect to the scope of review of a jury's verdict of guilty in a criminal case. It is settled law that the verdict of a jury in a criminal case must be sustained if there is substantial evidence, taking the view most favorable to the Government to support it. *Glasser* v. *United States,* 315 U. S. 60, 80; *United States* v. *Manton,* 107 F. 2d 834, 839 (C. A. 2), certiorari denied, 309 U. S. 664.[6] It is an improper interference with the jury's function for a court of appeals to reject the jury's theory of a case and accept another theory on the ground that it seems more credible. *United States* v. *Knight,* 336

[6] Accord: *Hardeman* v. *United States,* 163 F. 2d 21 (C. A. D. C.); *Yoffe* v. *United States,* 153 F. 2d 570, 572–573 (C. A. 1); *United States* v. *Valenti,* 134 F. 2d 362, 364 (C. A. 2), certiorari denied, 319 U. S. 761; *United States* v. *Reginelli,* 133 F. 2d 595, 598 (C. A. 3), certiorari denied, 318 U. S. 783; *Roberts* v. *United States,* 151 F. 2d 664, 665 (C. A. 5); *American Tobacco Company* v. *United States,* 147 F. 2d 93, 100 (C. A. 6), affirmed, 328 U. S. 781; *United States* v. *New York Great A. & P. Tea Co.,* 173 F. 2d 79, 81 (C. A. 7); *Gorin* v. *United States,* 111 F. 2d 712, 721 (C. A. 9), affirmed, 312 U. S. 19; *Scott* v. *United States,* 145 F. 2d 405, 408 (C. A. 10), certiorari denied, 323 U. S. 801.

U. S. 505; see *Stilson* v. *United States,* 250 U. S. 583, 588.[7] In setting aside the verdicts against the petitioners which had been upheld by the district court, the court below failed to follow this standard.

By considering and weighing the entire evidence—including that favorable to the respondents—the court assumed the jury's function of passing upon the credibility of witnesses and of choosing between conflicting versions of the facts. Thus respondents introduced evidence purporting to show that the same economic factors affected the pricing policies of the two dairies and expert testimony to the effect that in the case of a standardized product like milk virtual uniformity of price and practically simultaneous price changes might be expected (*supra,* pp. 6–7). Evidently on the basis of this evidence the court below stated that "the evidence is undisputed that every price change was made, not as the result of any understanding or agreement,

[7] This Court has been equally zealous in preserving the function of the jury in criminal and civil cases. *E. g.*, criminal: *Bozza* v. *United States*, 330 U. S. 160; *United States* v. *Bruno*, 329 U. S. 207; *Burton* v. *United States*, 202 U. S. 344, 373; *Crumpton* v. *United States*, 138 U. S. 361; civil: *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649, 653; and *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35. In the civil cases cited, the invasion of jury functions by appellate courts was stated as the reason for review by writ of certiorari.

but because of economic factors * * *" (R. 659).[8]

Again Gee, one of the sales representatives who participated in the price conferences which preceded the price changes, denied that any agreement as to prices was made by him (R. 256). This evidence was treated by the majority of the court below as establishing a fact (R. 659). The court failed to adhere to the cardinal rule that credibility is for the jury, which may well disbelieve denials of wrongdoing by interested witnesses.[9] The majority of the court below concluded that "Inferences which are contrary to established facts may not be drawn from mere

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[8] Even if it were proper for the appellate court to consider this somewhat speculative evidence, and even if it were given great weight, it would not destroy the inference from the conduct of the parties that prices were in fact established through concert of action. As the trial judge pointed out (79 F. Supp. at 18), if the price changes resulted both from economic factors *and* an unlawful combination the jury was authorized to render a verdict of guilty.

[9] A jury "does have the right and duty to judge the facts in the light of standards of human conduct, and to disregard that which appeals neither to reason nor experience." *Scott* v. *United States*, 145 F. 2d 405, 408 (C. A. 10), certiorari denied, 323 U. S. 801. It may believe or disbelieve testimony, although not contradicted by other direct testimony (7 Wigmore, *Evidence* (3d Ed., 1940) § 2034; *Aetna Life Ins. Co.* v. *Hagemyer*, 53 F. 2d 636, 637 (C. A. 5)), and it may accept part of the testimony of a witness and reject another part (*United States* v. *Reginelli*, 133 F. 2d 595, 598 (C. A. 3)). Nor is a jury compelled to believe testimony of innocence by a defendant-witness because called by the Government. 3 Wigmore, *Evidence* (3d Ed., 1940) § 897.

conjecture and an unwillingness to believe the unimpeached and uncontradicted testimony of witnesses" (R. 659–660). Thus the court weighed the evidence for itself, decided which parts of it resulted in "established facts" and which part was "mere conjecture." The inferences of price fixing from admitted price conferences followed by simultaneous price changes were evidently regarded as conjecture while the economic theories as to probable uniformity of prices of milk, and the denials of price fixing were accepted as established facts. It is difficult to conceive of a clearer case of invasion of the functions of the jury.[10]

[10] The court also asserted the dubious principle that circumstantial evidence must not only be consistent with the defendants' guilt but must be inconsistent with their innocence if it is to justify a verdict of guilty. We have no quarrel with the inclusion of this standard in the instructions to the jury in the instant cases (R. 619–620), although such an instruction has been held to be unnecessary where adequate instructions on the standard of reasonable doubt have been given. See Judge L. Hand in *United States* v. *Becker*, 62 F. 2d 1007, 1010 (C. A. 2). But there is no basis for the use of the rule as a justification for the substitution of the determination of an appellate court for that of the jury as to the proper inferences to be drawn from the evidence. As stated in *United States* v. *Valenti*, 134 F. 2d 362, 364 (C. A. 2), "It is the court's function to decide whether the evidence is competent to justify certain inferences; it is not the court's function to decide which of various inferences should be drawn. Nor is the jury to be limited to drawing only the inference most favorable to the accused." Accord: *Curley* v. *United States*, 160 F. 2d 229 (C. A. D. C.), certiorari denied, 331 U. S. 837; *Yoffe* v. *United States*, 153 F. 2d 570 (C. A. 1). Seemingly contra: *Nicola* v. *United States*, 72 F.

This Court has in the past granted certiorari in order to review civil cases (e. g., *Wilkerson* v. *McCarthy*, 336 U. S. 53, 55, and cases cited; *Carter* v. *Atlanta & St. Andrews Bay R. Co.*, No. 23, decided December 19, 1949) in which the appellate court has invaded the province of the jury, and administrative law cases (e. g., *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206), in which the appellate court has transgressed the bounds of judicial review. The maintenance of the jury's function in criminal cases is of equal importance.

3. Apart from its basic error of law in reweighing for itself the evidence favorable to the respondents against that which supported their conviction, the court below was influenced by at least two other misconceptions of law. In the first place the majority of the court of appeals treated the jury's verdicts of conviction as discredited by the verdicts of acquittal of other defendants. The court regarded the verdicts of the jury as of virtually no weight on the ground that the ac-

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2d 780 (C. A. 3); *Leslie* v. *United States*, 43 F. 2d 288 (C. A. 10).

It is significant that in the instant case the trial judge, who heard the evidence, was of the opinion that the evidence "is not as consistent with the innocence of the defendants as with their guilt. Taking the record as a whole we conclude the jury was justified, under the instructions, in finding that the facts evidencing conspiracy were consistent with the guilt of defendants and inconsistent with their innocence." 79 F. Supp. at 20.

quittal of the corporate officers "stripped the verdict of guilty as to the corporation defendants of all semblance of logic or reason, and to our minds weakened the presumption of correctness usually attributable to the verdict of a jury" (R. 661). Here, again, the decision below is in conflict with decisions of this Court. Even if the verdicts of acquittal and conviction were in fact hopelessly inconsistent,[11] that would not serve as a basis for setting aside the verdicts of conviction. Juries have the power to acquit illogically; their motives in so doing are completely immaterial.[12] A verdict of conviction of one defendant on one charge must be judged by whether it is supported by evidence—not by the consistency of the jury in dealing with other defendants or other charges. *United States* v. *Dotterweich,* 320 U. S. 277; *Dunn* v. *United States,* 284 U. S. 390; *American Medical Ass'n* v. *United States,* 130 F. 2d 233 (C. A. D. C.), affirmed, 317 U. S. 519; *United States* v. *General Motors Corp.,* 121 F. 2d 376 (C. A. 7), certiorari denied, 314 U. S. 618.

[11] Contrary to the assumption of the court of appeals, the jury here might rationally have concluded that the corporations conspired to fix prices through their sales representatives and at the same time have entertained a reasonable doubt as to the guilt of each of the individual officers charged. See opinion of district court, 79 F. Supp. at 18–19.

[12] Some of the reasons which may lead a jury to refuse to convict individuals are obvious. In the present case, as the district court pointed out (79 F. Supp. 19), there was a strong plea to the jury by counsel that conviction of the individuals would operate as a stain upon their reputations (R. 601–602).

The other misconception of law of the majority of the court below concerned the effect of the statute of limitations. The court regarded the period of the continuation of the conspiracy charged as having been broken by the three years of O. P. A. control.[13] It assumed that the usual three-year statute of limitations would bar conviction of charges based upon the evidence of the price conferences (all of which occurred during or before 1941), and that this evidence, if admissible at all, could "have but little bearing upon the course of conduct during the second period covered by the indictment" (R. 661). In fact, the statute of limitations was tolled during most of the war period (Act of Oct. 10, 1942, 56 Stat. 781), so that, as the district court correctly held (79 F. Supp. at 20), the pre-1941 acts could constitute part of the offense even on the theory that the continuity of conspiracy was broken in 1942, and the jury would have been justified in convicting on these acts alone.[14]

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[13] The trial judge instructed the jury to disregard price changes during this period (79 F. Supp. at 20).

[14] The court of appeals corrected the following sentence in its opinion (R. 660–661) by adding the italicized word:

"Whatever may have happened during this first period, being thus separated from what happened during the second period, would *ordinarily*, if charged as a separate offense, be barred by the three-year statute of limitations, and the evidence with reference to the conversations between these representatives, if admissible at all, could have but little bearing upon the course of conduct during the second period covered by the indictment."

4. The court of appeals also erred when it held that, in view of the fact that its decision required a new trial in this case, certain evidence admitted and a certain comment by Government counsel were prejudical to respondents. The evidence (Gov. Ex. 3, R. 81) showed, *inter alia,* ownership of defendant St. Louis Dairy Company by the National Dairy Products Corporation, and testimony as to salaries paid some of the individual defendants as officers of Pevely Dairy Company (R. 538–541). And Government counsel said, in his address to the jury, "* * * I presume there were dividends paid to the National Dairy Corporation" (R. 581).

The references to corporate ownership of a defendant could not, under the circumstances, have been prejudicial. Government Exhibit 3 was introduced only to show the names of the officers and directors of the St. Louis Dairy Company. Government counsel never characterized National as to size, location, or holdings. It was never suggested that any opprobrium attached to the name "National Dairy Products Corporation." The trial court was careful to instruct the jury to disregard extraneous matters in reaching its verdict with respect to the corporate defendants (R. 607, 614).

Government counsel's only reference to National in his closing argument bore upon defendants' contention that the price increases involved

in this case were necessitated by business losses. In the immediate context of this remark, counsel emphasized that the profit and loss problem was not material to the charge of restraint of trade (R. 580). The respondents did not object to any part of the closing argument. In such circumstances, far less moderate comment has been held unprejudicial. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239–243. As this Court has remarked, if every minor departure from the strict standards of comment by counsel were to be held reversible error, few verdicts would stand. *Dunlop* v. *United States*, 165 U. S. 486, 498.

The evidence of salaries paid officers of Pevely Dairy Company was introduced solely to rebut defendants' contention that their prices were fixed by economic law, not by concert of action. Defendants introduced extensive evidence showing their accounting system, purporting to prove that correct business practices dictated the precise price revisions made at particular times. It then became proper for the Government to show allocations of cost within that system, to demonstrate that losses shown in defendants' evidence were caused by excessive and incorrect charging of administrative expenses rather than by market pressures. The trial court instructed the jury to consider this evidence on that problem only (R. 622–623). If we assume *arguendo* that the evidence

was not relevant, the only possible prejudice would have been to the individuals whose salaries were shown, all of whom were acquitted. In treating the above inconsequential matters as involving prejudicial error the court below has departed from the salutary rule laid down by this Court in *United States* v. *Johnson,* 319 U. S. 503, 519, which properly rests the final decision on minor matters of admissibility in the sound discretion of the trial judge.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writs of certiorari should be granted.

ARNOLD RAUM,
Acting Solicitor General.

FEBRUARY 1950.

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IN THE

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OCTOBER TERM, 1949.

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ST. LOUIS DAIRY COMPANY.

BRIEF

Of Respondent, Pevely Dairy Company, in Opposition to Issuance of Writ of Certiorari.

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Nos. 592, 593.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

UNITED STATES OF AMERICA,
Petitioner,

v.

PEVELY DAIRY COMPANY.

UNITED STATES OF AMERICA,
Petitioner,

v.

ST. LOUIS DAIRY COMPANY.

BRIEF

Of Respondent, Pevely Dairy Company, in Opposition to Issuance of Writ of Certiorari.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit in the case entitled Pevely Dairy Company v. United States, and St. Louis Dairy Company v. United States, is reported in 178 F. 2d, p. 363. It also appears on pp. 650 to 662 of the record. The opinion of the District Court on defendants' motions to dismiss the indictment is reported in 77 F. Supp. at page 553, and its opinion on motion of each respondent for judgment of acquittal or a new trial is reported in 79 F. Supp. at page 12.

JURISDICTION OF THIS COURT.

In filing its petition for a writ of certiorari, petitioner has invoked the jurisdiction of this Court under Title 28, U. S. Code (New Federal Judicial Code), Section 1254. This respondent raises no question concerning the same.

STATEMENT OF THE CASE.

The indictment, returned February 25, 1948, charged that during the immediately preceding period of approximately ten years the defendants had continuously engaged in an unlawful conspiracy to fix uniform and non-competitive retail and wholesale prices for fluid milk sold by the corporate defendants, Pevely Dairy Company and St. Louis Dairy Company, these respondents, throughout the St. Louis Area, in restraint of trade and commerce and in violation of Section 1 of the Sherman Act, Act of July 2, 1890, c. 487, as amended, 15 U. S. C. 1 (R. 7). Such was the charge made, though during the "O. P. A. Period," that is, from April 28, 1942, to June 30, 1946, the prices which the dairies were permitted to charge for fluid milk were fixed by the Government (R. 149), and at the trial the Government abandoned its claim of price fixing during that period (R. 580).

By its original bill of particulars the Government conceded that it had no direct evidence of any conspiratorial agreement among the defendants and stated it would rely upon evidence from which, it claimed, an agreement could be implied, consisting in part of concert of action and course of conduct and in part of meetings and discussions concerning prices and price changes (R. 22). There was a supplemental bill of particulars (R. 24) and a second supplemental bill (R. 62). According to the indictment, as amplified by these bills of particulars, and omitting the O. P. A. period, the dates on which the alleged uniform

and practically simultaneous price changes charged to have been made by the corporate defendants covered (1) the period from April 8, 1938, to September 1, 1942, inclusive, it being alleged that such price changes were made on or about April 8, 1938, June 12 and August 7, 1939, and February 9 and December 1, 1940, and July 1 and September 1, 1941 (R. 62), and (2) the period from July 3, 1946, to January 27, 1948, inclusive, it being alleged that such price changes were made on or about July 3, July 9, October 4 (R. 22) (not October 14th stated in the indictment, R. 8), 1946, January 20, August 1, September 16, 1947, and January 27, 1948. The prices mentioned in the indictment (R. 8, 9) applied only to Grade A regular milk (R. 186), which did not include homogenized milk (R. 326), and consequently the alleged conspiracy relates alone to Grade A regular milk to the exclusion of all other dairy products (R. 326, 602).

The jury returned a verdict of guilty against the corporate defendants, these respondents, and acquitted all the individual defendants (R. 627, 628). Judgment of conviction was accordingly entered against each of the respondents (R. 629-631), each filed a motion for judgment of acquittal and in the alternative for a new trial (R. 631 634), which were overruled (R. 637), and each duly appealed to the United States Court of Appeals for the Eighth Circuit (R. 1, 2, 3), where, pursuant to the opinion of that court here sought to be reviewed (R. 650, 662), it was ordered and adjudged that the judgments of the District Court be reversed and the cause remanded to that court with directions to grant respondents a new trial (R. 663, 664).

The evidence shows that the fluid milk business in the St. Louis area is regulated and controlled by two governmental agencies, namely, the Department of Agriculture (R. 83) and the Health Department of the City of St.

Louis (R. 82). The Standard Milk Ordinance of the City of St. Louis embodies the statutory requirements of the United States Public Health Ordinance (R. 442, 445). The original ordinance, No. 40,939, approved December 15, 1936 (R. 32-59), remained basically unchanged during the periods here involved, though amended by Ordinance No. 41,242, approved February 23, 1938 (R. 30-32) and Ordinance No. 41,803, approved April 4, 1940, in particulars not here of consequence (R. 28-30). It prescribes minimum butter content and maximum bacterial count, and provides for the inspection of milk when received at the plant of the handler and for the inspection of the farm of the producer and the approval of the farm buildings and equipment on each dairy farm no matter where located. Under this ordinance fluid milk cannot be sold in the City of St. Louis unless it has been approved by the Health Commissioner of the City or unless it has been imported from some controlled milk shed where similar inspection has been made (R. 157, 158). And because of this ordinance Grade A milk became and is a standardized product; there is no appreciable difference between the Grade A milk of one dairy and that of another (R. 445). During all the period covered by the indictment the price to be paid to producers by all handlers for raw milk was determined pursuant to the Government's orders and regulations authorized by the Agricultural Marketing Agreement Act of 1937, under which the Secretary of Agriculture issued Order No. 3 (R. 85-95) as amended (R. 97-99), which was introduced by the Government as its Exhibit No. 4 (R. 83), establishing the basic formula by which the local Federal Milk Market Administrator determines the prices to be paid producers for milk. He announces monthly the prices to be paid by the handlers to the producers for Class I milk, including Grade A regular milk here involved, and Class II milk, including but-

ter, cream, skimmed milk and other dairy products. The prices actually paid the producer are "blended" prices made up of a combination of Class I and Class II prices, and dependent upon the character of the utilization made by the handler of such milk (R. 100, 142, 149).

At or about the time of the enactment of the Standard Milk Ordinance of the City of St. Louis there were approximately 9900 producers in the St. Louis milk shed, but by 1947 the number of producers had decreased to about 3300 (R. 152). The evidence for the Government showed that the supply of milk in the St. Louis area constantly became shorter and shorter (R. 235), making it necessary for the companies to import milk from Chicago, purchased from other handlers, for which they were required to pay a premium which increased during the scarce period when pastures were drying up (R. 141). The Government's evidence showed that during nearly all the period covered by the indictment there was an upward trend in the prices that handlers were required to pay producers; that the Class I price per quart (that is the average price paid by the dairies to the producers) increased from .0666 in January, 1942, to .1190 by December, 1947 (R. 134-137); that the premium required to be paid producers had gone up constantly for the ten years covered by the indictment (R. 141); and that the price required to be paid for labor is fixed by union contract and was increased from time to time (R. 236); and that these were the major cost factors (R. 236, 260) and were identical for both corporate defendants (R. 260).

In support of the charge in the indictment, as amplified by the original bill of particulars (R. 22, 23) and the supplemental bill (R. 24, 25), that the Government would rely in part upon the meetings and discussions between an employee of St. Louis Dairy Company and an employee of Pevely Dairy Company, the Government called two wit-

nesses, Julian Gee, an employee of St. Louis Dairy Company, and J. J. Wasser, an employee of Pevely Dairy Company. They testified to several meetings they had prior to October 1, 1941. Upon each such occasion one of these witnesses would have with him a list of increased prices that his company had decided to put into effect (R. 228, 231, 249) and would give the other a list of such prices. Both of these witnesses denied that there was ever any agreement or understanding between them as to a price change or a price increase (R. 229, 256). No such exchange of information was had after October 1, 1941 (R. 230, 254). The Government's evidence shows that neither of these witnesses had any authority to make for his company any agreement fixing prices (R. 229, 230, 231, 234, 252).

Mr. Wasser, as the Government's witness, testified that it was the practice of Pevely Dairy Company to have at each Board Meeting a report from the auditing department showing how the company was progressing on the sale of fluid milk; whether it was profitable or was going at a loss; and that there was always an economic reason for every change in price (R. 232). And the testimony of Mr. Gee, as the Government's witness, showed that whenever an increase was ordered in the price of production, or labor costs were increased under a new union contract, there would be a conference with Mr. Lide, president of St. Louis Dairy Company, Mr. Versen, vice-president, and Mr. Gee and Mr. Reinhardt, the comptroller, at which time Mr. Lide would call for the report of the comptroller as to costs, and the situation would be thoroughly considered (R. 236); the final decision resting with Mr. Lide (R. 234). And Mr. Gee said that every price change made by St. Louis Dairy prior to October 1, 1941, was made as the result of some drastic change in costs, either of labor or payments to the producers for milk (R. 249).

As to the price changes made by each of the companies during the second period mentioned above, that is from July, 1946, to January, 1948, inclusive, two were made in July, 1946, one in October, 1946, and the others in January, August and September, 1947, and January, 1948. That of January, 1947, which became effective for both companies on January 20 of that year, was a decrease in price, resulting from a decrease in price that the companies were required to pay producers for raw milk (R. 136, 262, 318). The other six changes during said period were increases. The Government's witness Mr. Gee testified that they were all justified by increased costs (R. 260). That such price increases were necessitated by increased costs was shown in detail by the testimony of Mr. Versen, vice-president of St. Louis Dairy Company (R. 308, 313, 317-320), and by defendant Pevely Dairy Company, particularly by its Exhibit I (R. 495), a tabulation or calculation by Mr. Nagel, Comptroller of the Company, of the increase or decrease in the operating expense per average quart of fluid milk sold by Pevely Dairy Company at retail and wholesale, compared to the selling price per unit quart (R. 496). From the item of administrative expense per unit quart appearing in that exhibit, all compensation of every character received by the Kerckhoff brothers from the corporation was eliminated (R. 499).

Mr. Nagel's testimony shows that many years prior to the ten-year period here involved he inaugurated for Pevely Dairy Company a cost accounting system that has ever since been employed, by the use of which the company's books show each month the cost of each unit item sold during that month, including raw material, plant expense, labor, delivery costs, overhead and all other cost factors, and the unit selling price, and that consequently the Company's books showed the total cost of a quart of Grade A milk delivered, at either wholesale or retail, and

the cost of all fluid milk, delivered in any sized container, and the resulting profit or loss during any period (R. 486, 489). Mr. Nagel testified that such method of allocating cost is the method established by the International Association of Milk Dealers set forth in a manual published in 1923 (R. 487). He had for years been a member of the Accounting Advisory Committee supplied by the industry to said association. By his testimony and said Exhibit I (R. 495) it was shown that the net increase in Pevely Dairy Company's cost of purchasing, processing and delivering an average quart of fluid milk from June, 1946, to January, 1948, was 6.61 cents—after eliminating all compensation paid to the five Kerckhoff brothers; and that the net increase in the selling price per unit quart during the same period was 6.5 cents (R. 495, 496, 499). Mr. Nagel's further testimony was that there was less profit on Grade A regular milk than on average fluid milk (R. 494), and that he believed that considering fluid milk as a whole presented a truer picture because it included the sale of milk carrying a higher profit (R. 494).

The cost records of Pevely Dairy Company were examined by Mr. Webber, a certified public accountant employed by Ernst & Ernst, a nationally known firm of certified public accountants. He said that the general accounting and cost records of Pevely Dairy Company constituted the most complete accounting system he had ever found in any organization (R. 504). From the cost records Mr. Webber made certain tabulations, marked Pevely Dairy Company's Exhibits J, K, L and M (R. 505, 513, 521, 525), introduced in evidence (R. 565), and concerning which Mr. Weber testified. Exhibit K (R. 513) shows the quart equivalents (that is, in quarts or other sized containers) sold by Pevely Dairy Company in all fluid milk operations for each month of the period of nineteen months ending January 31, 1948, showing the net

sales, cost of the product and various forms of other expense involved. The last column of that exhibit shows that for said period of nineteen months the company sold 79,086,783 quart equivalents of fluid milk, and that the profit, before provision for Federal and State income taxes (R. 519), amounted to .00401.

Judson P. Mason, Director of Dairy Marketing for the Illinois Agricultural Association and formerly statistician for the Federal Market Administrator in St. Louis, testified that Grade A milk is generally considered a standard product in a market where there is in effect the United States Public Health Ordinance (R. 445); that under conditions prevailing in the dairy business in the City of St. Louis, where there is a large number of customers and a small number of handlers, where the cost of raw material is identical to all handlers, the cost of labor practically identical for all handlers, and other costs run very similar, such factors tend to stabilize price levels (R. 446).

And Father Leo Brown, Professor of Economics at St. Louis University, testified that where as in the Grade A milk market in St. Louis there is a highly standardized product, the product of one dealer being the same as that of another, the economic fortunes of all the sellers are interdependent, and the economic fortunes of the two larger sellers are notably interdependent; that one large seller cannot long sell at a price higher than a price at which his competitors sell; that if he were to do that he would lose his customers and cause considerable customer dissatisfaction among those who remained (R. 455); that a highly standardized product is governed largely by price, and customers would follow the lower price (R. 456); that in such a market as he described he would expect practical uniformity of price without exception and practically simultaneous change in prices (R. 457).

Concerning the seven price changes during the second period mentioned above, that is, from July, 1946, to January, 1948, inclusive, the Government introduced United States Exhibits 11 to 25, inclusive (R. 184, 185, 186), which appear in the record on pages 187 to 220, inclusive. Each such exhibit is a price announcement by one of the corporate defendants of changes in its retail and wholesale prices, not only of Grade A milk but of many other dairy products, during said period. As shown above, all of said seven changes were increases except that which became effective on January 20, 1947. A stipulation was read in evidence showing when copy for each such price announcement made by St. Louis Dairy Company was received from it by its printer and the date on which each such price change was to become effective, and showing when copy for each such price announcement made by Pevely Dairy Company was received from it by its printer, when the printed announcements were delivered by the printer to Pevely Dairy Company, and the date on which each such price change was to become effective. The stipulation will be further noticed in the argument to follow.

And the Government's evidence shows that when the company initiating a price change issued its price announcements and the same were being delivered to its customers, the other company very quickly learned thereof, usually through such price announcements falling into the hands of its drivers or other employees (R. 238).

SUMMARY OF THE ARGUMENT.

I.

The Court of Appeals was quite right in holding that the evidence adduced was legally insufficient to sustain a conviction of respondents on the charge that they had engaged in a conspiracy to fix uniform and non-competitive prices of Grade A fluid milk sold and distributed by them throughout the St. Louis area. The Government concededly had no direct evidence of the conspiratorial agreement charged (R. 22). Its case rests entirely upon circumstantial evidence. Such circumstantial evidence, however, was wholly insufficient to support a conviction, for the following reasons:

(1)

While a jury is entitled to draw all reasonable inferences from the circumstances in proof, an appellate court is authorized to determine, and charged with the responsibility of determining, the reasonableness of such inferences. To sustain a conviction where the evidence relied upon is purely circumstantial, the evidence must not only be consistent with the guilt of the accused but must be such as to preclude every reasonable hypothesis of the defendant's innocence. Where all the evidence relied upon to support a conviction is as consistent with innocence as with guilt it is the duty of an appellate court to reverse a conviction.

United States v. Litberg (7 Cir.), 175 F. 2d 20;
Wesson v. United States (8 Cir.), 172 F. 2d 931;
United States v. Gasomiser Corp. (D. C. Del.), 7 Federal Rules Decisions 712;
Cartello v. United States (8 Cir.), 93 F. 2d 412;

Isbell v. United States (8 Cir.), 227 F. 788, 792, 793;
Union Pacific Coal Co. v. United States (8 Cir.), 173 F. 737, 740;
Neal v. United States (8 Cir.), 102 F. 2d 643, 648;
Yoffe v. United States (1 Cir.), 153 F. 2d 570;
United States v. Silva (2 Cir.), 131 F. 2d 247, 249;
United States v. Laffman (3 Cir.), 152 F. 393, 394;
United States v. Tatcher (3 Cir.), 131 F. 2d 1002, 1003;
United States v. Russo (3 Cir.), 123 F. 2d 420, 423;
Nicola v. United States (3 Cir.), 72 F. 2d 780, 786;
Paddock v. United States (9 Cir.), 79 F. 2d 872;
Blumenthal v. United States (9 Cir.), 158 F. 2d 762, 763;
Scott v. United States (10 Cir.), 145 F. 2d 405, 408;
Estep v. United States (10 Cir.), 140 F. 2d 40, 45;
Hammond v. United States, 75 U. S. App. D. C. 397, 127 F. 2d 752.

(a)

The well-settled rule that where all the evidence relied upon to support a conviction is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment of conviction if not inconsistent with the general principle invoked by petitioner that the verdict of a jury in a criminal case will be sustained if there is substantial evidence to support it.

Yoffe v. United States, 153 F. 2d 570, 572, 573.

(2)

The testimony of the Government's chief witnesses, Wasser (R. 227-233) and Gee (R. 233-240, 246-264), as to meetings between them on certain occasions prior to October 1, 1941, constitutes no proof of a conspiratorial agreement between these two corporate appellants to fix

the price of fluid milk for the reason that, not only had neither of them any authority to make any agreement as to prices, but both of them positively denied that there was ever any sort of agreement or understanding between them with respect to fixing prices. Being the Government's own witnesses, and having positively denied that they participated in any sort of a conspiratorial agreement, no inference of the making of a conspiratorial agreement by or through them could be drawn from their testimony.

Cartello v. United States (8 Cir.), 93 F. 2d 412;
Jacobson v. Hahn (2 Cir.), 88 F. 2d 433;
Wiget v. Becker (8 Cir.), 84 F. 2d 706;
Gold v. United States (8 Cir.), 36 F. 2d 16, 32, 33;
Yellow Cab Co. v. Rodgers (3 Cir.), 61 F. 2d 729.

(a)

The Court of Appeals was quite right in holding that inferences which are contrary to established facts may not be drawn from mere conjecture and an unwillingness to believe the unimpeached and uncontradicted testimony of witnesses (R. 659, 660); which statement was made in refutation of the contention that despite the undisputed testimony of the Government's own witnesses, Gee and Wasser, that they participated in no conspiratorial agreement, it could be inferred that they did that very thing. Such an inference would manifestly have nothing upon which to rest but mere conjecture, surmise and speculation, obviously insufficient to support a conviction.

Jacobson v. Hahn (2 Cir.), 88 F. 2d 433;
Cartello v. United States (8 Cir.), 93 F. 2d 412;
Winn v. Consolidated Coach Corporation (6 Cir.), 65 F. 2d 256, certiorari denied 291 U. S. 688, 78 L. Ed. 1059.

(3)

Whereas, as here, the Government must rely alone on circumstantial evidence to sustain the charge of a conspiratorial price fixing agreement, and the circumstantial evidence consists merely of proof of uniform price changes effective on or near the same day, in the sale of a standardized product in a highly competitive market, coupled with proof of uniformity of major cost factors, uniform cost increases, plus undisputed proof that every increase in price shown resulted from economic necessity and that the financial ruin of respondents would have resulted if such price increases had not been made, and that such uniformity in price resulted not from any agreement or attempt to maintain prices at fixed levels but from the prompt meeting by one of these companies of changes in prices by its major competitor, no case is made for the reason that the circumstances so shown are entirely consistent throughout with the defendants' innocence. The holding of the Court of Appeals to this effect is fully sustained by the authorities.

Cement Manufacturing Protective Ass'n v. United States, 268 U. S. 588, 605, 69 L. Ed. 1104, 1111;

United States v. Standard Oil Co. (8 Cir.), 47 F. 2d 288, 316, 317;

United States v. International Harvester Co., 274 U. S. 693, 708, 709, 71 L. Ed. 1302;

United States v. Sugar Institute (D. C. N. Y.), 15 F. Supp. 817, 887.

(a)

Under such circumstances uniformity of basic price in any given area is to be expected under a regime of free competition.

United States v. Sugar Institute (D. C. N. Y.), 15 F. Supp. 817, 887.

II.

It is the rule of decision of this Court that a writ of certiorari will not issue merely to review the evidence in a case or the inferences to be drawn therefrom.

General Talking Pictures v. Western Electric Co., 304 U. S. 175, 82 L. Ed. 1273, 1275;

Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508, 68 L. Ed. 413;

United States v. Johnston, 268 U. S. 220, 227, 69 L. Ed. 925, 926.

III.

The charge in petitioner's petition (pp. 16 to 18) that the Court of Appeals was influenced by "misconceptions of law" (1) as to the effect of the acquittal of the individual defendants and (2) as to the effect of the statute of limitations, is totally lacking in substance.

IV.

The Court of Appeals properly condemned as prejudicial error the injection into the case below of the evidence as to the compensation of the Kerckhoff defendants.

Union Electric Light & Power Co. v. Snyder Estate, 65 F. 2d 297, 303;

O'Hara v. Lamb Construction Co. (Mo. App.), 197 S. W. 163, 165.

ARGUMENT.

I.

The evidence relied upon by the Government, being all circumstantial and all consistent with innocence, is insufficient to support a conviction.

(1)

In holding that the circumstantial evidence adduced was insufficient to support a conviction, the Court of Appeals correctly stated and applied the settled law as declared by the Federal Courts with respect to the scope of review of a jury's verdict of guilty in a criminal case.

Logically, we think, the first thing to be considered is the broad charge made in petitioner's petition for the writ (p. 12) that "the decision below is in conflict both with the decisions of this Court and those of almost every other circuit with respect to the scope of review of a jury's verdict of guilty in a criminal case." This assertion we stoutly deny.

This attack upon the opinion of the Court of Appeals is based upon the proposition put forth by petitioner in its petition (p. 12) that "the verdict of a jury in a criminal case must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." That is nothing more than the statement of a broad general principle which the Court of Appeals in no way violated. In a case of this character, resting solely upon circumstantial evidence, what will constitute **substantial evidence** sufficient to sustain a conviction requires the consideration and application of the "**circumstantial evidence rule**" that has long been recognized and enforced

in the Federal courts and in many other courts as well. This rule is that, where the evidence relied upon is purely circumstantial, to sustain a conviction it is necessary that the circumstances shown in evidence be such as to exclude every reasonable hypothesis but that of guilt. It follows that where, as here, all the evidence relied upon to support a conviction is circumstantial in its nature and all thereof is entirely consistent with the innocence of the accused, it is insufficient to support a conviction. Among the many Federal cases so holding are the following: United States v. Litberg, 7 Cir., 175 F. 2d 20; Wesson v. United States, 8 Cir., 172 F. 2d 931; Cartello v. United States, 8 Cir., 93 F. 2d 412; Isbell v. United States, 8 Cir., 227 F. 788, 792, 793; Union Pacific Coal Co. v. United States, 8 Cir., 173 F. 737, 740; Neal v. United States, 8 Cir., 102 F. 2d 643, 648; United States v. Laffman, 3 Cir., 152 F. 393, 394; United States v. Tatcher, 3 Cir., 131 F. 2d 1002, 1003; United States v. Russo, 3 Cir., 123 F. 2d 420, 423; United States v. Silva, 2 Cir., 131 F. 2d 247, 249; Nicola v. United States, 3 Cir., 72 F. 2d 780, 786; Donovan v. United States, 3 Cir., 54 F. 2d 193, 195; Graceffo v. United States, 3 Cir., 46 F. 2d 852, 853; Paddock v. United States, 9 Cir., 79 F. 2d 872; Blumenthal v. United States, 9 Cir., 158 F. 2d 762, 763; Scott v. United States, 10 Cir., 145 F. 2d 405, 408; Estep v. United States, 10 Cir., 140 F. 2d 40, 45; Leslie v. United States, 43 F. 2d 288, 289, 290; Hammond v. United States, 75 U. S. App. D. C. 397, 127 F. 2d 752; United States v. Gasomiser Corp. (D. C. Del.), 7 F. R. D. 712.

In the first case cited above, **United States v. Litberg**, 7 Cir., 175 F. 2d 20, the Court of Appeals for the Seventh Circuit, in an excellent opinion by Judge Major, concurred in by Judge Minton (now Mr. Justice Minton of this Court) and Judge Duffy, aptly stated the principles to be observed by an appellate court in determining whether circumstantial evidence is sufficient to support a judgment of conviction as follows:

"On the one hand we must keep in mind the oft-repeated rule that the weight and credibility to be attached to testimony of the witnesses is a matter for the trier of the facts and that we are required to take that view of the evidence most favorable to the Government. On the other hand, while the trier of the facts is entitled to draw all reasonable inferences from the circumstances in proof, the court of review is charged with responsibility of determining the reasonableness of such inferences. In other words, an inference may not properly be relied upon in support of an essential allegation if a just inference may be drawn with equal consistency from the circumstances in proof. In United States v. Tatcher, 3 Cir., 131 F. 2d 1002, 1003, the court reversing a conviction based on inferences stated: 'To justify conviction of crime where the evidence relied upon is circumstantial in nature, the evidence must be such as to exclude every reasonable hypothesis but that of guilt. United States v. Russo, 3 Cir., 1941, 123 F. 2d 420. As we have seen the evidence relied upon to sustain the defendant's conviction is as consistent with his innocence as with his guilt.'" (Citing United States v. Russo, 3 Cir., 123 F. 2d 420, 423; Isbell v. United States, 8 Cir., 227 F. 788, 792; Pierce v. United States, 6 Cir., 115 F. 2d 399, 400; and Hammond v. United States, 75 U. S. App. D. C. 395, 127 F. 2d 752, 753.)

The presumption with which an accused is clothed when standing before the bar of justice is not overcome by evidence, alone, that offers a reasonable hypothesis other than guilt—that is entirely consistent with innocence. That ancient presumption is fundamental in our jurisprudence. And because of that presumption, in every criminal prosecution by the Government not only is the jury required to find from the evidence that the defendant is guilty beyond

a reasonable doubt, if the case is sent to the jury, but **in order to get the case to the jury the burden is upon the Government to adduce evidence from which reasonable minds may fairly conclude guilt beyond a reasonable doubt;** and proof merely of circumstances that are consistent throughout with the innocence of the defendant does not satisfy that burden and does not warrant the submission of the case. Such evidence does not constitute **substantial evidence** such as to warrant a conviction.

The general principle invoked by petitioner in this connection, namely, that the verdict of a jury will be sustained if there is "substantial evidence" to support it, is in no wise in conflict with what we have said above. In **Yoffe v. United States**, 1 Cir., 153 F. 2d 570, cited by petitioner, the court (l. c. 572, 573) said:

> "Appellants claimed that the evidence before the trial court was insufficient to warrant submission of any of the issues to the jury. They refer to the statement which has often been quoted with approval in Federal decisions: 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse the judgment of conviction.' (Citing authorities.)
>
> "The statement does not conflict with the general principle that in criminal cases the trial court may not properly direct a verdict if there is any substantial competent evidence before it to support a conviction (citing authorities), and that on a motion for a directed verdict that view of the evidence most favorable to the government and the inferences reasonably deducible therefrom must be accepted."

It follows that petitioner's criticism of the opinion of the Court of Appeals with respect to the scope of review of a jury's verdict of guilty in a criminal case is wholly unwarranted. The authorities cited by petitioner do not sustain its position in this regard.

In Glasser v. United States, 315 U. S. 60, upon which petitioner relies, nothing may be found with which the opinion of the Court of Appeals in this case is in conflict. In the Glasser case this Court (315 U. S. 80, 86 L. Ed., l. c. 704), said that "the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it" (citing United States v. Manton, 107 F. 2d 834, 839, also here relied upon by petitioner). For the reasons stated above, the opinion of the Court of Appeals in the instant case is in no wise in conflict with the ruling in the Glasser case or that in the Manton case. And as to the application of the circumstantial evidence rule, it should be noted that in the Glasser case this Court, upon affirming the conviction of the other defendants, reversed the judgment below as to Glasser because of error committed at the trial, and expressly refrained from expressing an opinion as to whether the circumstances in evidence warranted a submission of the case to the jury as against Glasser.

Further authorities cited by petitioner in this connection in the footnote, p. 12, of its petition, do not, upon analysis, serve to cast any doubt upon the soundness of the law as here declared and applied by the Court of Appeals. The Hardeman Case (C. A. D. C.), 163 F. 2d 21, is here inconsequential; and Yoffe v. United States (3 Cir.), 153 F. 2d 570 (cited also on p. 17 of the petition) from which we have quoted above, is directly contrary to petitioner's contention. In United States v. Valenti (2d Cir.), 134 F. 2d 362 (also cited on p. 15 of the petition) the Court

properly ruled that the facts and circumstances there in evidence—wholly unlike those here present—"logically lead to the inference of guilt." In United States v. Reginelli (3 Cir.), 133 F. 2d 595, where the charge was the violation of the Mann Act (18 U. S. C. A., secs. 398, 399) there was abundant evidence consistent with guilt and inconsistent with innocence. And the Court (133 F. 2d, l. c. 599), said: "In the circumstances thus shown, the trial court would not have been warranted in declaring, as a matter of law, that a lawful purpose on the part of the defendant for the transportation was as inferable from the evidence in the case as an immoral purpose." This is in plain recognition of the rule applied by the Court of Appeals in the instant case.

In Scott v. United States, 3 Cir., 145 F. 2d 405, cited twice by petitioner in its petition (pp. 12, 14), the Court definitely recognized the rule applied by the Court of Appeals in the instant case. The court held that circumstantial evidence may fully suffice to warrant a conviction, "provided the circumstances relied upon are wholly consistent with guilt and inconsistent with any other reasonable hypothesis" (citing authorities) the Court adding:

> "In arriving at its conclusions the jury may not speculate upon the guilt of the defendant, or choose between equally permissible inference of guilt or innocence" (citing authorities).

In Curley v. United States, cited in the footnote on p. 15 of the petition, the Court of Appeals for the District of Columbia, in an opinion by Judge Prettyman, to which there was a vigorous dissent, found fault with the earlier opinion of that court in Hammond v. United States, supra, 127 F. 2d 752, 753, because therein the court, quoting from Isbell v. United States, 8 Cir., 227 F. 788, 792, recognized the circumstantial evidence rule as stated and applied in

United States v. Litberg, supra, 7 Cir., 175 F. 2d 20, and in a long line of other Federal Cases. However, the auther of the majority opinion in the Curley Case (160 F. 2d, l. c. 232) said:

> "The true rule, therefore, is that a trial judge, in passing upon a motion for a directed verdict of acquittal (motion for judgment of acquittal under the new Federal Rules), must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw **justifiable** inferences of fact, **a reasonable mind might fairly conclude guilt beyond a reasonable doubt.**" (Emphasis ours.)

Thus the court restated an old rule not inconsistent with, but necessarily embracing within its concept the true circumstantial evidence rule as stated and applied in the Litberg Case, the Isbell Case and all the other cases herein relied upon by this respondent, for, if the evidence is wholly circumstantial, and the circumstances shown are just as consistent with innocence as with guilt, how may a reasonable mind fairly conclude guilt **beyond a reasonable doubt?**

And we note that in the later case of McGuire v. United States, 171 F. 2d 136, 138, the same court stated and applied the rule quoted above from the Curley Case.

Nor is there any warrant for the statement in petitioner's petition for the writ (pp. 12, 13, 15, 16), that in the instant case the Court of Appeals, in setting aside the verdicts below, rejected the jury's theory of the case and accepted another theory on the ground that it seemed more credible, weighed the evidence, and by such means invaded the province of the jury. Nowhere in the opinion of the Court of Appeals may any justification be found for

this attack upon the opinion. On the contrary, the Court of Appeals properly applied the well established rule that had theretofore been reiterated and applied by the same court and by other Federal courts in a long line of cases, some of which are cited above, namely, that where circumstantial evidence alone is relied upon to support a conviction, such evidence, in order to constitute substantial evidence warranting a conviction, must not only be consistent with the defendant's guilt but inconsistent with his innocence; must be such as to exclude every reasonable hypothesis but that of guilt (R. 660, 661).

(2)

The testimony of the Government's witnesses, Wasser and Gee, as to meetings between them prior to October 1, 1941, does not support a conviction.

In petitioner's petition (pp. 9, 10, 14, 15) reference is made to the testimony of the Government's witness Wasser, sales manager for Pevely Dairy Company (R. 227-233), and its witness Gee, salesmanager for St. Louis Dairy Company (R. 233-240, 246-264), as to meetings between them on certain occasions prior to October 1, 1941. Such testimony, we submit, not only constitutes no evidence of a conspiratorial agreement between the corporate defendants, these respondents, but on the contrary negatives the existence of such an agreement. Their testimony showed that they met on several occasions during the period from August 7, 1939, to August 28, 1941, and upon such occasions one would furnish the other with a list of prices showing price changes that the former's company had already determined upon, and the future date upon which the new prices were to become effective (R. 227-234, 248-250). Mr. Wasser testified that during the period mentioned he had upon certain occasions informed Mr. Gee of what Pevely Dairy Company's "prices were to be

after the company had decided to raise the price" (R. 227, 228). He definitely denied, however, that he was ever assured that St. Louis Dairy Company would put such price changes into effect (R. 228, 229). And Mr. Gee testified:

> "Q. Now, Mr. Gee, in connection with any of these price changes, as salesmanager for the St. Louis Dairy Company, did you ever agree with Mr. Wasser or any competitor to have a price change or price increase? A. I most certainly did not.
>
> Q. Never in your life? A. Never" (R. 256).

Now the Government's theory, upon which it has proceeded throughout this case, namely, that despite the positive testimony of these witnesses that they did not make or take part in any sort of conspiratorial agreement, constituting the only evidence as to what occurred between them, a jury may lawfully find, upon mere conjecture, speculation and surmise, that they were not telling the truth, but did in fact enter into agreements to fix the price of Grade A fluid milk, is, we submit, utterly fallacious. Such theory is contrary to both reason and authority. **Cartello v. United States**, 8 Cir., 93 F. 2d 412; **Jacobson v. Hahn**, 2 Cir., 88 F. 2d 433; **Wiget v. Becker**, 8 Cir., 84 F. 2d 706; **Gold v. United States**, 8 Cir., 36 F. 2d 16, 32, 33; **Yellow Cab Co. v. Rodgers**, 3 Cir., 61 F. 2d 729.

In **Cartello v. United States**, supra (93 F. 2d 412), the defendants, election officials, were charged with having conspired to injure citizens in the free exercise or enjoyment of the rights and privileges secured to them by the Constitution and laws of the United States, through the alteration of ballots at a general election. The evidence adduced by the Government, consisting of the testimony of two witnesses, went to show that the defendants were not guilty of the offense charged. In holding that the

evidence was insufficient to support a conviction, the Court said:

> "It is argued that these ballots could have been erased in the very presence of the government witnesses, Lemon and Lynch, without their knowledge, but the evidence is to the contrary and convictions cannot be sustained on mere possibilities. Had these witnesses, with personal knowledge, not been placed upon the witness stand by the government, there might have been some room for suspicion or surmise that this had been done, **but the government has itself proven that although the ballots were altered, they were not altered by either of the defendants at this polling place.** Ordinarily, a litigant is bound by the testimony of his own witnesses, **especially if that testimony is uncontradicted and there is no claim of mistake.**" (Emphasis ours.)

In **Jacobson v. Hahn**, 88 F. 2d 433, the Court of Appeals for the Second Circuit applied the same rule in a civil case. That was a suit in equity by Jacobson against Hahn as Clerk of the District Court for the Northern District of New York and others, one defendant being the Collector of Internal Revenue, to recover certain bonds that had been deposited by plaintiff with the clerk as bail for one Flegenheimer who had been charged with a criminal offense but had been acquitted and to declare invalid a lien that the collector had filed for taxes. The testimony of the witnesses called by defendants, as well as that of plaintiff's witnesses, established that the bonds were not the property of Flegenheimer; that the money that went to purchase them belonged entirely to others and was not loaned to Flegenheimer. The Court (88 F. 2d, l. c. 435) said:

> "Having called these witnesses to whose testimony we have referred, the defendants may not now suc-

cessfully question their statements and ask us to reject them as untruthful or unworthy of belief upon mere suspicion that the money was loaned to Flegenheimer. Carlyle v. Norris, 215 N. Y. 400, 109 N. E. 564, Ann. Cas. 1917A, 429; Pollock v. Pollock, 71 N. Y. 137. The testimony is not inherently improbable nor is it contradicted by evidence, and the collector having presented it is bound by it. Postene & Co. v. Irving Nat'l Bank, 249 N. Y. 272, 164 N. E. 499; Arnall Mills v. Smallwood, 65 F. 2d 57 (C. C. A. 5).

"We are therefore obliged to hold the finding below that part of the money was Flegenheimer's is without evidence to support it. Since the fact is sufficiently established that Flegenheimer obtained the $75,000.00 used to purchase the bonds for bail purposes only the Court below was not at liberty to draw contrary inferences and place total ownership in Flegenheimer upon mere conjecture or unwillingness to believe the witnesses called by the defendants. Winn v. Consolidated Coach Corp. (C. C. A.), 65 F. 2d 256, certiorari denied 291 U. S. 668, 54 S. Ct. 543, 78 L. Ed. 1059. Mere suspicion, conjecture or surmise is insufficient. See Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 344, 53 S. Ct. 391, 395, 77 L. Ed. 819."

In **P. Pastene & Co. v. Irving National Bank**, 249 N. Y. 272, 164 N. E. 49, cited in Jacobson v. Hahn from which we have just quoted, wherein the opinion was written by Judge O'Brien and concurred in by Judge Cordozo, later Mr. Justice Cordozo of this Court, and Judges Pound, Crane, Andrews and Kellogg, the Court held that where evidence produced by the plaintiff tending to show that he had no right of recovery, which was not "inherently improbable or materially contradicted by other evidence" was binding upon the plaintiff, citing Carlyle v. Norris (cited in Jacobson v. Hahn, supra), 215 N. Y. 400, 109 N. E. 564, Ann. Cas. 1917A, 429.

The Court of Appeals, indeed, was quite right when it said in its opinion: "Inferences which are contrary to established facts may not be drawn from mere conjecture and an unwillingness to believe the unimpeached and uncontradicted testimony of witnesses." This is obviously sound law. Certainly, facts may be taken as "established" when shown by unimpeached and uncontradicted testimony from the lips of the Government's own witnesses, **constituting the only testimony on the subject.** It here serves no useful purpose for petitioner to discourse upon the right of a jury to believe or disbelieve witnesses. If other testimony had been adduced contrary to that of Wasser and Gee, quite another situation would have been presented. But since their testimony was the only testimony on the subject, and stood wholly uncontradicted and unimpeached, neither the court nor the jury could utterly disregard that testimony and find upon mere surmise, conjecture or suspicion that these witnesses did something they said they did not do. This rule has been applied both where the unimpeached and uncontradicted testimony in question was that adduced by the Government (Cartello v. United States, supra, 8 Cir., 93 F. 2d 412) and where the unimpeached and uncontradicted testimony was that adduced by defendants (Jacobson v. Hahn, supra, 2 Cir., 88 F. 2d 433; Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 340, 341, 77 L. Ed. 819, 822, 823).

In the Chamberlain case just cited this Court said:

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony from unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the facts sought to be inferred did not exist."

A long line of decisions, Federal and State, are cited in support thereof.

In this connection petitioner in its petition (pp. 9, 10) quotes that portion of the District Court's opinion on motions for judgment of acquittal in this case (79 F. Supp. 12, 17, 18), wherein the court said that one would be naive to conclude that at one of these conferences the agent initiating the conference did so solely to tell his competitor's agent, "We are going to raise our prices on Grade A milk one and one-half cents commencing thirty-six hours hence. Goodbye." In this the District Judge plainly erred. Such remark constituted a holding to the effect that the jury could find, **upon mere conjecture, surmise or suspicion,** that these witnesses had discussions as to prices which they said they did not have, **and which is utterly and wholly unsupported by any other evidence of any character in the record.** And not only this, but the District Judge's further statement to the effect that a message such as he mentioned could have been transmitted by telephone, shows that the learned Judge failed to hold in mind the evidence regarding that matter. The record shows the prices in question did not relate to that of Grade A regular milk alone, but to retail and wholesale prices of quite a long list of other products, such as are shown by the price announcements introduced as Defendants' Exhibits (relating to a later period) appearing on pages 187 to 220, inclusive, of the record. The communication in question merely consisted of the giving by one of these witnesses to another a list of prices **that the former's company had already determined to put into effect** and was taking steps to put into effect (R. 231, 249).

Nor is this all. The testimony of both of these Government witnesses not only shows that the price changes that came about during this period were not made by virtue of any sort of an agreement between the corporate defend-

ants, but shows that they came about because of economic necessity (R. 232, 235, 236, 249), and were not put into effect by either corporate defendant until those authoritatively in charge of its affairs had thoroughly canvassed the situation and found that such increased prices were a necessity (R. 232, 235, 236).

And in addition to all this is the further fact that this record shows without contradiction or dispute that neither of these men had any authority whatsoever to fix prices or make any sort of an agreement with anyone for the fixing of prices for or on behalf of the corporate defendant he represented (R. 229, 230, 231). Just how the corporate defendants could be held criminally liable because of the acts of agents having no authority to make for them any sort of a conspiratorial agreement, the Government has never, throughout this entire case, undertaken to show.

In its petition (p. 11) petitioner says:

> "A meeting at which A says, 'I am going to raise my price 10 cents next week,' and B says, 'I will, too,' has the same consequence—economical and legal—as one in which A and B expressly agree on a price to be charged."

The record affords no justification for such argument. According to the undisputed testimony of these Government witnesses, when one would give the other a price announcement or list of prices it would be with a statement that his company had ordered that the increased prices be put into effect; and on no occasion did the other party to the conference ever say that his company would do likewise. **There was never any "I will too"** (R. 229, 256). Nor, according to the testimony of these two witnesses, did they upon any such occasions "discuss price changes to be made" as stated by petitioner in its petition (p. 9). The fact that Mr. Wasser, in informing Mr. Gee of an increase

in price determined upon by Pevely Dairy Company, hoped that Mr. Gee's company would increase its price, too (R. 229), certainly has no tendency to show any conspiratorial agreement. On the contrary, the very fact that Mr. Wasser could only **hope** that the competitor would increase its price negatives the making of any conspiratorial agreement. Hope, which springs eternal in the human breast, has not as yet come under the ban of the Sherman Anti-Trust Act.

(3)

In view of the evidence as a whole and the stipulated facts, proof of uniform price changes made effective by respondents on or near the same date did not constitute circumstantial evidence such as to support a conviction.

Since the Government relied alone upon circumstantial evidence to sustain the charge made against the corporate defendants, these respondents, of a conspiratorial agreement fixing the sale price of Grade A regular milk, and such circumstantial evidence consisted merely of proof of uniform price changes which became effective on or near the same day, and testimony of the Government's witnesses, the stipulated facts, as well as undisputed evidence adduced by the defendants, showed that the product was a standardized product vended in a highly competitive market, with proof of uniformity of major cost factors, uniform increases from time to time in such cost factors, that every increase in price resulted from economic necessity, and that such uniformity in price resulted not from any agreement or attempt to maintain prices at fixed levels but from the prompt meeting by one of these companies of changes in price theretofore put into effect by its major competitor, no case was made for the jury for the reason that the circumstances so relied upon by the Government were entirely consistent throughout with the defendants' innocence.

As appears from our statement, supra, the record shows that because of the Standard Milk Ordinance Grade A milk is a thoroughly standardized product. There is no appreciable difference between the Grade A milk of one dairy and that of another (R. 445). It appeared in the Government's case that during all the period covered by the indictment prices to be paid from time to time to producers by all handlers in the St. Louis area for raw milk were the same, the price being regulated by Order No. 3 of the Secretary of Agriculture (R. 84, 85-95, 97-99). It further appeared that the principal labor costs for both respondents were the same, being fixed by contracts between the handlers and the union (R. 236), which were identical for all handlers and thus, in effect, industry-wide contracts (R. 330, 457). And it appeared in the Government's case that the cost of the raw product and the labor costs were the two major cost items for both companies (R. 236). Naturally the cost of equipment, gasoline, bottles and materials generally were bound to be substantially the same for both companies per quart of Grade A milk. And the Government's witness, Mr. Gee, said that the cost price for both companies on the major portion of costs would be the same; that there isn't much margin for a difference between them (R. 260).

It appears beyond dispute that these respondents, the two large dairies in the City of St. Louis, were selling a standarized product in a highly competitive market with uniform basic costs. The testimony of Judson P. Mason, Director of Dairy Marketing with the Illinois Agricultural Association and formerly statistician for the Federal Market Administrator in St. Louis, is shown in our statement, supra, and was referred to by the Court of Appeals in its opinion (R. 657). He testified not only that Grade A milk is a highly standardized product, but where, as here, the cost factors are basically identical for all handlers and other costs very similar, such factors tend to

stabilize price levels (R. 446). And Dr. Leo Brown, Professor of Economics at St. Louis University, whose testimony is shown in our statement, supra, and referred to in the opinion of the Court of Appeals (R. 657, 178 F. 2d, l. c. 368), testified that under conditions such as are present in the milk industry in St. Louis, the product of one dealer being the same of another, the economic fortunes of all the sellers are interdependent, **and the economic fortunes of the two large sellers are notably interdependent; that one cannot long sell at a price higher than that of his competitors** (R. 445); **that in such a market he would expect practical uniformity of price with slight exceptions and practically simultaneous change in price** (R. 457).

The testimony of these expert witnesses serves to shed much light upon the conditions prevailing on the Grade A milk market in the City of St. Louis during the period here involved. It is true that this testimony came from the lips of defense witnesses. However, not only does it stand wholly unrefuted and undisputed, but it merely shows in greater detail the fundamental features of the case as shown by the Government's own evidence. Indeed, we submit, the Government's own evidence and the **stipulated facts** to which we shall presently refer, conclusively show that every fact and circumstance in this case from which the Government has sought to have an inference of guilt drawn is thoroughly consistent with the innocence of these respondents; though we think it cannot be doubted that where, as here, the evidence relied upon for a conviction is purely circumstantial, the court, in ruling a motion for a judgment of acquittal at the close of all the evidence, is authorized to look if need be to the defense evidence in determining whether the inferences to be drawn from the facts and circumstances shown in proof by the Government offer a reasonable hypothesis other than guilt. United States v. Gasomiser Corporation (D. C. Del.), 7

F. R. D. 712, 720, 721, 722. And it may be here noted that the testimony of these experts accords exactly with the brief statement of Mr. Wasser on the stand as the Government's witness **that it was impossible for Pevely Dairy Company to get a higher price than its competitor** (R. 229). Indeed, the evidence both for the Government and the defense irrefutably shows that, **in view of the circumstances and conditions under which these two dairies are forced to operate, uniformity of price will naturally and inevitably come about** despite the fact, as shown by the Government's own evidence, that there is between these two companies very keen competition and rivalry in the matter of obtaining and retaining wholesale and retail customers (R. 257), as well as in the matter of obtaining a supply of raw milk from producers (R. 180), of which there has been a shortage in this area for many years (R. 143).

The Court of Appeals was quite right in holding in its opinion:

> "The milk as handled by appellants was a standardized product. Its cost items being substantially identical for both appellants, uniformity in price would result from economic forces (R. 657, 178 F. 2d, l. c. 368).
>
> * * * * * * *
>
> "We are clear that mere uniformity of price in the sale of a standardized commodity such as milk is not in itself evidence of the violation of the Sherman Anti-Trust Act" (R. 659, 178 F. 2d, l. c. 369).

In this connection the court not only referred to the testimony of the expert witnesses mentioned above but quoted from a recent treatise by Edward H. Chamberlain, Professor of Economics at Harvard University, and from the decision of this Court in **Cement Manufacturers Protective Ass'n v. United States,** 268 U. S. 588, and the decision of the Court of Appeals for the Eighth Circuit in **United**

States v. Standard Oil Company, 47 F. 2d 288, both of which decisions are here squarely in point (R. 658, 659, 178 F. 2d, l. c. 368, 369).

The Government has laid great stress upon the uniformity of price changes during the period of nineteen months from July, 1946, to January, 1948, as shown by the price announcements of these respondents (United States Exhibits 11 to 25, inclusive, R. 187-220, introduced in evidence by the Government, R. 184-186). There were seven of these price changes during that period, all of which except that of January 20, 1947, being price increases. As shown in our statement, the Government's witness, Mr. Gee, testified that all such increases were justified by increased costs (R. 26). And this was further shown by the testimony of Mr. Versen (R. 308-313, 317-320), and shown in detail by this respondent, Pevely Dairy Company, particularly by its Exhibit I (R. 495), which had been prepared by its controller, Mr. Nagel, and by its Exhibit K (R. 513), prepared by Mr. Weber from Mr. Nagel's cost records. Exhibit I showed that during said period of nineteen months from June, 1946, to January, 1948, in which there had been six increases and one decrease in the selling price of fluid milk, a total increase of .065, the total net increase in cost per unit quart was .066 (R. 495, 500); while the last column of Exhibit K shows that for said nineteen months period the profit, before provision for Federal and State income taxes, amounted to .00401 per unit quart (R. 513). In other words, there was approximately a profit of **four mills** per unit quart during that period, while the net increase to the company of purchasing, processing and delivering a unit quart of milk had increased more than **six and one-half cents.** It is easy to see that without such increases the company could not have continued to operate.

The stipulation mentioned above shows certain conceded and highly significant facts in connection with the making

of the change which occurred in the price of Grade A milk during said period of nineteen months. That stipulation appears on pages 546 and 547 of the record. As to each such price change the stipulation shows which company initiated the change, when its copy was received by its printer for printing price announcements of such change for delivery to its customers, and when its price change was to become effective, and shows, too, when the other company sent its printer copy for printing its price announcements regarding the same price change and when it made its price change effective; and shows also when Pevely Dairy Company's printed announcements for each such price change were returned to it by its printer. The stipulation shows that Pevely Dairy Company's printer returned to it the printed announcements on the same day the printer received the copy thereof in every instance except for the price change which became effective August 1, 1947. Upon that occasion the copy was delivered by the company to the printer on July 25, 1947, and the printed announcements were returned to the company on July 29, 1947; the other facts shown by the stipulation are summarized in the following tabulation:

St. Louis Dairy Company		Pevely Dairy Company	
Date Copy Received by Printer	Date Price Change Effective	Date Copy Received by Printer	Date Price Change Effective
7/ 2/46, 4:30 P. M.	7/ 4/46	7/ 2/46	7/ 3/46
7/ 8/46, 6:30 P. M.	7/ 9/46	7/ 9/46	7/10/46
9/ 4/46, 11:00 A. M.	10/ 5/46	10/ 3/46	10/ 4/46
1/17/47, 8:30 A. M.	1/20/47	1/20/47	1/20/47
7/30/47, 5:00 A. M.	8/ 1/47	7/25/47	8/ 1/47
9/11/47, 4:00 P. M.	9/16/47	9/15/47, 9:15 A. M.	9/16/47
1/26/48, 9:00 A. M.	1/28/48	1/23/48	1/27/48

The dates appearing in bold-face type in this tabulation serve to indicate the company which initiated the particular price change.

It thus appears that **in only three instances out of the seven** (the changes effective on January 20th, August 1st and October 16th, 1947) **did the price changes of the two**

companies go into effect on the same day; and not in a single instance was there simultaneous action to bring about the price change. In each instance the company not initiating the price change had ample opportunity to learn of its competitor's action and to thereafter take steps to notify its own customers in time to put into effect its own price on the date it is shown to have become effective. In one instance, that is, when Pevely Dairy Company initiated the price change on July 25, 1947, St. Louis Dairy Company did not send its copy for its price announcements until **five days** later. In the case of the change in September, 1947, **four days** elapsed after the St. Louis Dairy Company initiated the price change and sent its copy to the printer before Pevely Dairy Company sent its copy to its printer. And **three days** were involved in the change made in January, 1948.

And the Government's own evidence conclusively shows that when the company initiating a price change issued its price announcements and they were being delivered to its customers, copies thereof very quickly fell into the hands of the drivers or other employees of its competitor showing what had occurred. The Government's witness Mr. Gee testified that **a competitor would know of a price change "no more than it was on the street"** (R. 238). And the undisputed evidence makes it clear that those operating a dairy under conditions such as are shown to have been here present must ever be alert to discover any price change by a competitor so as to be able to take prompt action as to its own price situation. A decrease in price by one company must be promptly met by the other or the latter will suffer a great decrease in the volume of its business. Customers knowing that the milk of the two dairies must necessarily be of the same high quality to be approved as Grade A milk, will not pay even a small premium for the milk of a particular dairy (R. 229, 455).

And, as shown above, the increases mentioned were invariably brought about by increased cost factors common to both companies (R. 232, 249, 260). Naturally neither company cared to be the first to initiate a price increase. As to this, the expert witness Mason said:

> "In all our experience, lots of times we know that our costs are mounting. We know we would like to raise prices, and sometimes, we are glad if somebody else does it first, and we follow suit, we know that we are on pretty safe ground because we don't have to worry about somebody taking our business. In other words, everybody is subject to the same pressure, and if somebody breaks under that pressure by raising prices, you will find normally that other handlers will come up and meet it in a tight market" (R. 444).

Obviously, when one company took the initiative and announced a price increase in order to prevent suffering more loss, its competitor would be under the same necessity for a price increase, and the latter's action in promptly adopting the new price certainly can afford no substantial evidence of a conspiratorial agreement to fix prices.

The language of this Court in its opinion in **Cement Manufacturer's Protective Association v. United States**, 268 U. S. 588, 69 L. Ed. 1104, quoted by the Court of Appeals in its opinion in the instant case (R. 658, 178 F. 2d, l. c. 369), is here directly applicable, namely:

> "• • • The fact is that any change in quotations of price to dealers promptly becomes well known in the trade through reports of salesmen, agents, and dealers of various manufacturers. It appears to be undisputed that there were frequent changes in prices and uniformity has resulted not from maintaining the prices at fixed levels but from the prompt meeting of changes in prices by competing sellers."

It follows that the conviction of these respondents does not rest upon evidence but purely upon suspicion, speculation, conjecture and surmise.

II.

And since the decision of the Court of Appeals is in no way in conflict with the decisions of this Court or of other Courts of Appeal, but states and applies the settled law as declared by this Court and the Courts of Appeal, a writ of certiorari should not issue herein. It is the settled rule of decision of this Court that the writ will not issue merely to review the evidence in a case or the inferences to be drawn therefrom. General Talking Pictures v. Western Electric Company, 304 U. S. 175, 82 L. Ed. 1273, 1275.

III.

The charge in petitioner's petition (pp. 16-18) that the Court of Appeals was influenced by misconceptions of law, (1) as to the acquittal of the individual defendants, and (2) as to the effect of the statute of limitations, calls for scant notice, if any. As to the former, the Court said:

> "It is true the question on review is not whether the verdict of acquittal of the individual defendants was warranted, but whether the verdict of guilty against the corporation is sustained by substantial evidence, and mere inconsistency in verdicts is not fatal" (R. 661, 178 F. 2d, l. c. 370, 371).

And the opinion upon its face plainly shows that the Court's decision did not rest in any degree upon the theory that anything that occurred prior to the O. P. A. period would be barred by limitations (R. 660, 661, 178 F. 2d 370).

IV.

It cannot be doubted that the Court of Appeals properly condemned as prejudicial error the injection into this case

below of evidence as to the compensation of the Kerckhoff defendants (R. 539, 540). Union Electric Light & Power Co. v. Snyder Estate, 65 F. 2d 297, 303; O'Hara v. Lamb Construction Co. (Mo. App.), 197 S. W. 163, 165. Petitioner says that this evidence was introduced merely to rebut defendants' contention that their prices were determined by economic necessity and not by concert of action and the evidence they adduced in support of such contention. But the record refutes this. Government counsel got the matter before the jury at an early stage of the trial in the redirect examination of the witness Wasser (R. 233), long before the defendants introduced any evidence, obviously for the sole purpose of injecting prejudice into the case. There never was any attempt by the Government to allocate administrative expense to the cost of Grade A milk or fluid milk as a whole. And, as shown above, in this respondent's evidence as to cost increases all compensation received by the Kerckhoff brothers from the corporation had been eliminated (R. 496, 499). And it is altogether plain that under the circumstances the injection of this matter into the case was prejudicial to the corporation as well as to the individual defendants, the owners thereof.

CONCLUSION.

For the reasons hereinabove stated, we submit that petitioner's petition for the writ should be denied, and pray that this be done.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

UNITED STATES OF AMERICA,
Petitioner,

v.

ST. LOUIS DAIRY COMPANY,
Respondent.

BRIEF

Of Respondent, St. Louis Dairy Company, in Opposition to Petition for Writ of Certiorari.

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No. 593.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

UNITED STATES OF AMERICA,
Petitioner,

v.

ST. LOUIS DAIRY COMPANY,
Respondent.

BRIEF

Of Respondent, St. Louis Dairy Company, in Opposition to Petition for Writ of Certiorari.

OPINIONS BELOW AND JURISDICTION.

The data set out and statements made by petitioner in its brief, pages 1 and 2 under the above headings, are correct and concurred in by this respondent.

QUESTIONS PRESENTED.

Actually only two questions are presented by the petitioner.

1. Whether there was substantial evidence to justify the District Court in overruling respondent's motions for a

verdict of acquittal at the close of the Government's case, at the close of all the evidence, and for a judgment of acquittal or, in the alternative, for a new trial, after verdict and judgment were rendered against respondent.

2. Whether the admission of evidence as to the foreign control of respondent and as to the compensation of individual defendants constituted reversible error.

Question No. 1 rephrases what petitioner has set out in different and rather inaccurate language as its Questions 1 and 2. Petitioner's Question 4 is identical with Question 2 above. Petitioner's Question No. 3 is irrelevant and unnecessary.

STATEMENT.

Petitioner's description of the proceedings below is correct. For the purpose of completeness it may be added that separate motions for judgment of acquittal were filed by respondent at the close of the Government's case, at the close of all the evidence, and, after verdict, for judgment of acquittal or in the alternative for new trial. They all were overruled by the District Court (R. 287-293, 571-578, 631-637).

The Government charged a conspiracy among two dairies and some of their officers to fix retail and wholesale milk prices of Grade A regular milk in the St. Louis area, for the ten-year period prior to the return of the indictment on February 15, 1948 (R. 4-10, 22-25, 62). The two dairies (or handlers, as they are sometimes referred to) are the St. Louis Dairy Company and the Pevely Dairy Company, the two largest milk distributors in the area. The individual defendants were the president of respondent, Basil M. Lide, and the five Kerckhoff brothers who were, respectively, president and directors of Pevely Dairy.

All the defendants were tried together. The jury acquitted all individual defendants, but found the corporations guilty. On appeal the convictions were reversed. Petitioner rested its case on circumstantial evidence alone, and admitted that it had no direct evidence of any express oral or written conspiratorial agreement by or between any of the defendants (R. 22 and 71). The Government contended that "an oral agreement" could be "implied" from circumstantial evidence consisting primarily of uniform price changes made effective by both corporate defendants within short spaces of time of each other, and from certain conversations between the two sales managers of the corporate defendants, Gee and Wasser, in the period from August 7, 1939, through August 28, 1941.

Both Gee and Wasser were called as government witnesses and unequivocally denied the existence of any conspiratorial agreement (R. 256, 229). They testified positively concerning the economic necessity for each of the price changes involved, and their testimony on both points was fully supported by the testimony of other defendants' witnesses.

There is no conflict in the evidence relating to the cost factors involved in the marketing of milk and concerning the circumstances—all beyond defendants' control—which make the milk a uniform product. The price of raw milk is determined and fixed pursuant to government orders and regulations, stemming from the Agricultural Marketing Agreement Act of 1937 as amended (Act of June 3, 1937, c. 296, 50 Stat. 249, 7 U. S. C. A. 671, as amended, R. 100). The defendants had no voice in the determination of those prices (R. 147). In the ten-year period in question there were steady and continuous increases in producers' price which show a total rise in raw milk cost from January, 1942, to January, 1948, of about 5 cents per quart (R. 135-7). The second largest cost factor to the handlers is

labor for processing and distributing the milk. Labor contracts are negotiated with the unions on an industry-wide basis with a consistent upward trend in the wages which affect the costs of both dairies identically (R. 330, 457). The same pattern is disclosed by the **other cost factors** such as gasoline used for delivery, coal burned in the plants, bottles, caps and other commodities required for the processing and distributing of Grade A milk by the handlers (R. 386).

The foregoing cost factors applicable to Grade A milk are regularly analyzed by the sales and accounting management of the company on the basis of a cost allocation and accounting system used by respondent for the past ten years (R. 374), and which follows the system established by the International Association of Milk Dealers (R. 377) and adopted by dairies generally throughout the country (R. 339). Under this system the allocation of all costs and expenses is on a functional basis as to each product sold by respondent. Materials, receiving expenses and labor processing expenses are allocated directly to the product to which they relate (R. 363-364). Delivery, selling and administrative expenses are allocated to each product on a point system which is based on selling units such as a quart of milk or a pound of butter, cheese and other similar products. The point system, upon which are also bottomed the union labor contracts, is predicated on the principle that the cost of delivery is alike for every unit (R. 382-383).

These are the cost factors and cost allocation data which are furnished to the president of St. Louis Dairy when its sales and accounting management advises him from time to time in connection with price determinations (R. 235, 304, 384-387). The only person vested with authority to, and who does as a matter of practice, determine prices is the president of the company, Mr. Lide (R. 234, 237, 303, 384, 385, 482).

One of the factors which is considered by Lide in arriving at a price determination is the price change which a competitor may already have announced or decided upon (R. 305, 392). It is important to find out price changes adopted or announced by any competitor at the earliest possible moment. Every employee of respondent is urged to get any available information from other drivers, stores where price lists may have been left, customers in general, of price changes made by a competitor and to immediately report to the management (R. 238-9, 314). Any price change of Pevely or other local handler affects the operation of respondent; of Pevely most, because it is largest, and the most serious competitor. If the change consists of a reduction, St. Louis Dairy would lose customers unless it promptly conforms; if it is an increase in price due to some change which has or soon will increase costs, it must consider moving too, since the same costs necessarily affect the operation of St. Louis Dairy in the same manner (R. 305-306, 393).

In order to be able to report to the management more promptly any price change determined or promulgated by Pevely, Julian W. Gee, sales manager of respondent, did on four occasions in the period August, 1939 (R. 248), to August 28, 1941 (R. 254),* exchange information with Joseph J. Wasser, Pevely's sales manager, concerning price changes, after they had been determined by the company making the change, but before the effective date of the change (R. 227, 228, 233-234, 246-250). Both Gee and Wasser, who testified as government witnesses, denied the existence of any conspiracy or agreement (R. 256 and 229, respectively). Nevertheless the government relied

* R. 254. On direct examination Gee testified that that conversation had taken place on September 2, 1941 (R. 234). Inasmuch as September 2 was the effective date of the price change, the reason for the apparent mistake is obvious. The conversation took place on August 28 and the price change was effective September 2.

on inferences contrary to the oral testimony of these witnesses.

After exchanges such as this were found to be a subject of criticism and thus discontinued,† respondent confined its sources of information about price changes decided and determined upon by competitors to that obtainable by the company's drivers, through newspaper reporters and similar media. This is the testimony of the government's witness (R. 238-9).

The evidence further shows that certain uniform price changes were made by both companies, as set forth in the indictment and the bill of particulars by the government, and that those **price changes** were **neither simultaneous nor were they always initiated by the same company** (R. 546-547, 564-565). Economic justification for each of those changes was testified to by a government witness (R. 249) and others (R. 308-320). The uniformity of the price changes was explained by the respondent's employees and by independent economists having personal experience in the St. Louis Milk Market situation: Judson P. Mason, the Director of Dairy Marketing for the Illinois Agricultural Association, with both government and private experience in the field, including service with the St. Louis Federal Milk Marketing Administration (R. 439-440); and Father Leo C. Brown, S. J., Professor of Economics at St. Louis University and a member of the Dairy Council (R. 452-454). They testified that **Grade A Milk is a standard product**, in that there is very little difference in the milk of one dairy as to another and that its butter fat, bacterial content and other requirements are brought into uniformity by rigid administration of the St. Louis Milk

† Peremptory instructions to that effect were given to Gee and Wasser by officials of their companies (R. 315 and 230-231, respectively) and Gee desired to avoid any appearance of impropriety, following a Grand Jury investigation (R. 254).

Ordinance. This ordinance, which embodies the sanitary requirements of the United States Public Health Service Ordinance (R. 442, 445) remained basically unchanged during the period involved here (Ordinance No. 40939 of December 15, 1936, as amended by Ordinance No. 41242 of February 23, 1938 and by Ordinance No. 41803 of April 4, 1940, R. 28-59). They further testified that in a competitive market the **cost factors being identical** for the relatively few sellers, and the supply of milk being short for all, **uniformity of prices and practically simultaneous price changes are the natural and inevitable result of the same economic pressures upon all** (Mason, R. 446-448; Brown, R. 457), bringing about almost simultaneous price announcements (R. 461-462).‡

All of the evidence, both on the government's and on the respondent's side, shows free and bitter competition exists between the two respondents, both in the continuous struggle to expand the milk supply at the expense of the other company, and in securing the customers of each other (R. 183, 257, 472, 473). That evidence was supported and amplified by independent experts who testified that there is plenty of competition among the dairies in the St. Louis market (R. 446-7, 455, 462).

During the regime of the O. P. A. both the minimum price paid to producers and the maximum price charged to customers were dictated by public authority. This program was supported by a government subsidy to the producers. At the termination of these conditions the supported price level was maintained by passing on the deficiency from the producers to the handlers, who in turn undertook to retrieve it from consumers (R. 146, 317).

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‡ This evidence is apparently overlooked by petitioner when it states (Petition, p. 4) that "During the period covered by the indictment the record reveals no instance of price competition between the two respondents in respect of Grade A milk."

The record shows that after the disestablishment of the O. P. A.'s milk control (June, 1946), the total price increases made by respondent to its customers until and including February, 1948, amounted to 5½¢ per quart on Grade A regular milk, whereas the total increase in the cost to it of material and labor for that period was 6¢ and a fraction per quart (R. 467-469). The government introduced no testimony upon this subject and the fact of this unfavorable price balance is uncontradicted by any evidence.

This is the circumstantial evidence in the case upon which the jury found defendant Lide "not guilty" and which the appellate court held insufficient as a matter of law to sustain the conviction of respondent.

SUMMARY OF THE ARGUMENT.

I. Certiorari does not issue to review evidence or inferences drawn from it.

Abrams v. United States (1919), 250 U. S. 616, 619, 63 L. Ed. 1173, 1176, 40 S. Ct. 17;

Chicago & N. W. R. Co. v. Ohle (1886), 117 U. S. 123, 129, 29 L. Ed. 837, 839, 6 S. Ct. 632;

General Talking Pictures v. Western Electric Company (1938), 304 U. S. 175, 82 L. Ed. 1273, 1275;

Lancaster v. Collins (1885), 115 U. S. 222, 225, 29 L. Ed. 373, 374, 6 S. Ct. 33;

Mortensen v. United States (1944), 322 U. S. 369, 374, 88 L. Ed. 1331, 1335, 64 S. Ct. 1037;

Troxell v. Delaware, Lackawanna & Western R. Co. (1913), 227 U. S. 434, 442, 57 L. Ed. 586, 590, 33 S. Ct. 274;

United States v. Socony-Vacuum Oil Co. (1940), 310 U. S. 150, 254, 84 L. Ed. 1129, 1184, 60 S. Ct. 869.

II. There is no conflict with the Supreme Court or among the Circuits as to the rule applied by the Court of Appeals below that respondent's motions for acquittal should have been sustained for the reason that there was no substantial evidence, considered in the light most favorable to the Government, to support the conviction.

1. The Court of Appeals applied the controlling substantial evidence rule, and did not weigh the evidence, as erroneously claimed by petitioner.

2. In determining the sufficiency of the circumstantial evidence, upon which the Government relied exclusively, the Court of Appeals was entitled to pass upon the reasonableness of the inferences to be drawn from the circumstances proven, and properly held that the motion of

acquittal should have been sustained in the absence of reasonable inferences supporting the conviction to the exclusion of the hypothesis of respondent's innocence.

American Tobacco Co. v. United States (C. C. A. 6, 1944), 147 F. 2d 93, 101, aff. (1946) 328 U. S. 781, 90 L. Ed. 1575, 66 S. Ct. 1126;

Appalachian Electric Power Co. v. N. L. R. B. (C. C. A. 4, 1938), 93 F. 2d 985, 989;

Beck v. United States (C. C. A. 8, 1929), 33 F. 2d 107, 112;

Bishop v. United States (C. C. A. 8, 1926), 16 F. 2d 410, 416-7;

Cady v. United States (C. C. A. D. C., 1923), 293 F. 829;

Consolidated Edison v. Columbian Enameling & Stamping Co., 306 U. S. 292, 300, 83 L. Ed. 660, 59 S. Ct. 501;

Cravens v. United States (C. C. A. 8, 1932), 62 F. 2d 261, 274;

Curley v. United States (C. A. D. C., 1947), 160 F. 2d 229, cert. den. 331 U. S. 837;

Dickerson v. United States (C. C. A. 8, 1927), 18 F. 2d 887, 893;

Eastern Coal Corp. v. N. L. R. B. (C. C. A. 4, 1949), 176 F. 2d 131, 136;

Edwards v. United States (C. C. A. 8, 1925, 7 F. 2d 357, 360;

Estep v. United States (C. C. A. 10, 1943), 140 F. 2d 40, 45;

Gargotta v. United States (C. C. A. 8, 1935), 77 F. 2d 977, 981;

Gold v. United States (C. C. A. 8, 1929), 36 F. 2d 16, 32;

Graceffo v. United States (C. C. A. 3, 1931), 46 F. 2d 852, 853;

Grant et al. v. United States (C. C. A. 3, 1931), 49 F. 2d 118, 119-120;

Grantello v. United States (C. C. A. 8, 1924), 3 F. 2d 117, 118;

Hammond v. United States (C. A. D. C., 1942), 75 U. S. App. D. C. 395, 127 F. 2d 752, 753;

Karchner v. United States (C. C. A. 7, 1932), 61 F. 2d 623;

McClintock v. United States (C. C. A. 10, 1932), 60 F. 2d 839, 842;

McLaughlin v. United States (C. C. A. 3, 1928), 26 F. 2d 1, 3;

Nicola v. United States (C. C. A. 3, 1934), 72 F. 2d 780, 786;

Nosowitz v. United States (C. C. A. 2, 1922), 282 F. 575, 578;

Parnell v. United States (C. C. A. 10, 1933 on rehearing), 64 F. 2d 324, 329;

Peightel v. United States (C. C. A. 8, 1931), 49 F. 2d 235, 240;

Peters v. United States (C. C. A. 8, 1947), 160 F. 2d 319, 320, cert. den. 331 U. S. 825, 91 L. Ed. 1840, 67 S. Ct. 1316;

Read v. United States (C. C. A. 8, 1930), 42 F. 2d 636;

Ridenour v. United States (C. C. A. 3, 1926), 14 F. 2d 888, 892-3;

Romano v. United States (C. C. A. 2, 1925), 9 F. 2d 522, 524;

Roukous v. United States (C. C. A. 1, 1912), 195 F. 353, 361, cert. den. 225 U. S. 710, 56 L. Ed. 1267, 32 S. Ct. 840;

Salinger v. United States (C. C. A. 8, 1927), 23 F. 2d 48, 52;

Schad v. 20th Century-Fox Film Corp. (C. C. A. 3, 1943), 136 F. 2d 991, 996;

Scott v. United States (C. C. A. 10, 1944), 145 F. 2d 405, 408, cert. den. 323 U. S. 801, 89 L. Ed. 639, 65 S. Ct. 561;

Spalitto v. United States (C. C. A. 8, 1930), 39 F. 2d 782, 784;

Sullivan v. United States (C. C. A. 8, 1922), 283 F. 865, 868;

Tingle v. United States (C. C. A. 8, 1930), 38 F. 2d 573, 575;

Turinetti v. United States (C. C. A. 8, 1924), 2 F. 2d 15, 17;

Union Pacific Coal Company v. United States (C. C. A. 8, 1909), 173 F. 737, 740;

United States v. Gasomiser Corporation (D. C. Dela., 1947, reh. den. 1948), 7 F. R. D. 712;

United States v. Laffman (C. C. A. 3, 1945), 152 F. 2d 393, 394;

United States v. Litberg (C. C. A. 7, 1949), 175 F. 2d 20, 21;

United States v. Valenti (C. C. A. 2, 1943), 134 F. 2d 362;

VanGorder v. United States (C. C. A. 8, 1927), 21 F. 2d 939, 942;

Wesson v. United States (C. C. A. 8, 1949), 172 F. 2d 931, 933;

Wiener v. United States (C. C. A. 3, 1922), 282 F. 799, 801;

Willsman et al. v. United States (C. C. A. 8, 1923), 286 F. 852, 856-7;

Yoffe v. United States (C. C. A. 1, 1946), 153 F. 2d 570;

Yusem v. United States (C. C. A. 3, 1925), 8 F. 2d 6, 8.

3. Applying the above rule to the case at bar, the Appellate Court was justified in holding that there was no substantial evidence of respondent's guilt, considering the

proven circumstances in a light most favorable to the government.

A. No reasonable inference of respondent's guilt to the exclusion of its innocence could be drawn from the uniformity of the retail and wholesale prices charged by the two dairies for Grade A milk and from the proximity in time of their prices changes, since the unrefuted positive evidence showed that those changes were dictated exclusively by impelling economic reasons, flowing from the undisputed facts that the cost factors for producing Grade A milk are substantially identical for both dairies, that Grade A milk is a standardized product sold in a tight market, and that those prices were decided upon by respondent in the exercise of its independent business judgment.

a. Each one of the price changes made by respondent, and in issue here, was dictated exclusively by impelling economic reasons, and was decided upon by respondent in the exercise of its independent business judgment. This is the undisputed fact of all the direct evidence.

American Tobacco Company v. United States (1946), 328 U. S. 781, l. c. 804, 90 L. Ed. 1575, l. c. 1591, 66 S. Ct. 1126.

b. Grade A milk being a standardized product sold in a tight market, and its cost items being substantially identical for both respondents, uniformity in prices and price changes is bound to result from those identical economic forces.

Cement Mfrs. Protective Ass'n v. United States (1925), 268 U. S. 588, 69 L. Ed. 1104;

Federal Trade Commission v. The Cement Institute et al. (1948), 333 U. S. 683, 708, 92 L. Ed. 1010;

United States v. International Harvester Co. (1927), 274 U. S. 693, 708-9, 71 L. Ed. 1302;

United States v. Standard Oil Company of New Jersey (D. C. E. D. Mo., 1931), 47 F. 2d 288, 316-317;
United States v. Sugar Institute (D. C. N. Y., 1934), 15 F. S. 817, 887.

c. The price changes in question were not simultaneous, nor were the price changes initiated always by the same respondent.

American Tobacco Company v. United States (1946), 328 U. S. 781, l. c. 804, 90 L. Ed. 1575, l. c. 1591, 66 S. Ct. 1126;
Davis v. United States (C. C. A. 6, 1901), 107 F. 753, 755;
Lilienthal's Tobacco v. United States (1878), 97 U. S. 237, 266, 24 L. Ed. 901, 905;
United States v. Standard Oil Company of New Jersey (D. C. E. D. Mo., 1931), 47 F. 2d 288, l. c. 316.

B. No reasonable inference of respondent's guilt to the exclusion of its innocence could be drawn from the remote conversations between Gee and Wasser, who appeared as government witnesses, and who by direct, unimpeached, uncontradicted and reasonable testimony denied any conspiracy.

Arnall Mills v. Smallwood (C. C. A. 5, 1933), 68 F. 2d 57, 59;
Cartello v. United States (C. C. A. 8, 1937), 93 F. 2d 412, 415;
Ezzard v. United States (C. C. A. 8, 1925), 7 F. 2d 808, 811;
Foran et al. v. Commissioner (C. C. A. 5, 1948), 165 F. 2d 705, 707;
Heard v. United States (C. C. A. 8, 1919), 255 F. 829, 832;
Howell Turpentine Co. v. Commissioner (C. C. A. 5, 1947), 162 F. 2d 319, 325;

Jacobson v. Hahn et al. (C. C. A. 2, 1937), 88 F. 2d 433;

Pennsylvania R. R. Co. v. Chamberlain (1933), 288 U. S. 333, 340-1, 77 L. Ed. 819, 823, 53 S. Ct. 391;

Tatt v. Commissioner (C. C. A. 5, 1948), 166 F. 2d 697, 699;

Texas Co. v. Hood et al. (C. C. A. 5, 1947), 161 F. 2d 618, 620, cert. den. 332 U. S. 829, 92 L. Ed. 403, 68 S. Ct. 206;

Winn v. Consolidated Coach Corp. (C. C. A. 6, 1933), 65 F. 2d 256, 257;

Yellow Cab Co. of Philadelphia v. Rodgers (C. C. A. 3, 1932), 61 F. 2d 729;

Young v. United States (C. C. A. 5, 1938), 97 F. 2d 200, 202, reh. den. 97 F. 2d 1023.

III. The Appellate Court properly held that the judgment of the District Court should be reversed because of prejudicial evidence received over objections of respondent, and the District Court erred in not striking from the record the evidence objected to by respondent.

Braatelien et al. v. United States (C. C. A. 8, 1945), 147 F. 2d 888, 892;

Commonwealth v. Giles, 1 Gray (Mass.) 466;

Kettenbach v. United States (C. C. A. 9, 1913), 202 F. 377, 383;

O'Hara v. Lamb Construction Co. (Mo. App., 1917), 197 S. W. 163, 165;

Union Electric Light & Power Co. v. Snyder Estate Co. et al. (C. C. A. 8, 1933), 65 F. 2d 297, 302-303;

United States v. Adams Express Co. (D. C. Iowa, 1902), 119 F. 240, 242;

United States v. Gouled (D. C. N. Y. 1918), 253 F. 239;

United States v. Pierce (D. C. N. Y. 1917), 245 F. 888, 890;

United States v. Socony-Vacuum Oil Co. (1940), 310 U. S. 150, 239-243.

IV. The Appellate Court did not hold, as suggested by petitioner, that (A) the statute of limitations applied to the case at bar, nor that (B) the jury's verdicts of conviction were discredited by the verdicts of acquittal.

Coen v. American Surety Co. of N. Y. (C. C. A. 8, 1941), 120 F. 2d 393, 400, cert. den. 314 U. S. 667, 86 L. Ed. 534, 62 S. Ct. 128;

People v. Altice Case (1922), 222 Mich. 379, 190 N. W. 289;

Watson v. St. Louis, I. M. & S. R. R. Co. (C. C. Ark. 1909), 169 F. 942, 945, aff. 223 U. S. 745, 56 L. Ed. 639, 32 S. Ct. 533.

ARGUMENT.

I.

Certiorari Does Not Issue to Review Evidence or Inferences Drawn From It.

As it appears from the Petition, and is more fully discussed hereinafter, the Government is seeking review of the decision below merely to have this Court pass on the sufficiency of the evidence and on the reasonableness of the inferences drawn from it. This Court has repeatedly stated that certiorari is not granted ordinarily for such purposes. Thus, in **General Talking Pictures v. Western Electric Company** (1938), 304 U. S. 175, 82 L. Ed. 1273, 1275, this Court said:

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U. S. 508, 68 L. Ed. 413, 44 S. Ct. 164; United States v. Johnston, 268 U. S. 220, 227, 69 L. Ed. 925, 926, 45 S. Ct. 496."

In an apparent attempt to keep outside the scope of those holdings, petitioner claims that the Appellate Court "has invaded the province of the jury" (Petition, p. 16). The charge is unwarranted as a reading of the opinion and the following discussion show. Moreover, it is significant that petitioner has not found a single case in which this Court has granted certiorari in a criminal case which may be considered a precedent in point here (Petition, p. 16). The Appellate Court did examine the record, not for the purpose of weighing the evidence, but for the purpose of determining whether there was substantial evi-

dence to support the verdict. That this is the proper rule is established by ample authority in the decisions of this Court:

Mortensen v. United States (1944), 322 U. S. 369, 374, 88 L. Ed. 1331, 1335, 64 S. Ct. 1037;

Abrams v. United States (1919), 250 U. S. 616, 619, 63 L. Ed. 1173, 1176, 40 S. Ct. 17;

Troxell v. Delaware, Lackawanna & Western R. Co. (1913), 227 U. S. 434, 442, 57 L. Ed. 586, 590, 33 S. Ct. 274;

Lancaster v. Collins (1885), 115 U. S. 222, 225, 29 L. Ed. 373, 374, 6 S. Ct. 33;

Chicago & N. W. R. Co. v. Ohle (1886), 117 U. S. 123, 129, 29 L. Ed. 837, 839, 6 S. Ct. 632.

This rule has been applied to a conviction for violation of the Sherman Act in **United States v. Socony-Vacuum Oil Co.** (1940), 310 U. S. 150, 254, 84 L. Ed. 1129, 1184, 60 S. Ct. 869, where this Court said:

> "A question of law is thus raised, which entails an examination of the record, not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict."

II.

There Is no Conflict With the Supreme Court or Among the Circuits as to the Rule Applied by the Court of Appeals Below That Respondent's Motions for Acquittal Should Have Been Sustained for the Reason That There Was no Substantial Evidence, Considered in the Light Most Favorable to the Government, to Support the Conviction.

1. **The Court of Appeals applied the controlling substantial evidence rule, and did not weigh the evidence as erroneously claimed by petitioner.**

The crux of the petition and the main ground relied upon for the issuance of certiorari are predicated on the assertion that the Appellate Court committed a "basic error of law in reweighing for itself the evidence favorable to the respondents against that which supported their conviction" (Petition, p. 16; see also pages 7, 12, 13 and 15). The government's contention is founded on an erroneous premise, for the reason that the Court of Appeals **did not weigh the evidence.** It merely applied the substantial evidence rule. A reading of the opinion below makes this crystal clear:

> "* * * the question on review is * * * whether the verdict of guilty as against the corporations is sustained by substantial evidence * * *" (R. 661, 178 F. 2d Adv. Op. 363, 370).

This is the well settled rule of appellate review in a criminal case, and is no different from the substantial evidence rule which is admitted by petitioner (Petition, p. 12).

Applying this rule, the Court concluded:

> "We are of the view that the proven circumstances, considered in the light most favorable to the govern-

ment, are not inconsistent with the innocence of appellants, and hence, their motions for acquittal should have been sustained'' (R. 661, 178 F. 2d, l. c. 371).

As the following discussion will show, this is the inescapable result of the application of the rule to the evidence in this case, and there is no true issue as to controlling law.

2. **In determining the sufficiency of the circumstantial evidence, upon which the government relied exclusively, the Court of Appeals was entitled to pass upon the reasonableness of the inferences to be drawn from the circumstances proven, and properly held that the motion of acquittal should have been sustained in the absence of reasonable inferences supporting the conviction to the exclusion of the hypothesis of respondent's innocence.**

Petitioner asserts that the reviewing court committed error in ''substituting its judgment for that of the jury in deciding what inferences should be drawn from the evidence and what evidence should be believed'' [Petition, p. 7 (2) and passim]. This assertion is stoutly denied. The Appellate Court did not substitute its judgment for that of the jury, but merely exercised its traditional and time-honored function of determining whether the inference drawn by the trier of the facts is a **reasonable** one, viewing the evidence in the light most favorable to the government. Nor is there any conflict among the circuits on the point, as shown by the decisions discussed hereinafter.

Petitioner further contends that the Court below ''asserted the **dubious** principle that circumstantial evidence must not only be consistent with defendant's guilt but must be inconsistent with their innocence if it is to justify a verdict of guilty'' (Petition, p. 15, note 10; our emphasis).

This somewhat hesitant challenge against a well established principle of criminal procedure is purportedly supported by the government by reference to the cases of **Curley v. United States** (C. A. D. C., 1947), 160 F. 2d 229; **United States v. Valenti** (C. C. A. 2, 1943), 134 F. 2d 362, and **Yoffe v. United States** (C. C. A. 1, 1946) 153 F. 2d 570.

But all three of these cases involved evidentiary situations entirely different from that at bar. Secondly, not one of those decisions actually sustains the government's contention. In the **Curley** case, the Court did not rule out the function of the reviewing court to pass on the reasonableness of the inferences:*

> "The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. **If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal,** because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make" (160 F. 2d, l. c. 232). (Our emphasis.)

In the **Valenti** case, the Court reviewed the evidence and concluded that the inferences drawn by the jury were both "logical and natural" (134 F. 2d, l. c. 364) and that "the bases for inference seem to us quite substantial" (134 F. 2d, l. c. 365). After having stated the passage re-

* It is significant that in **Peters v. United States** (1947), 160 F. (2d) 319, 320, cert. den. (1947) 331 U. S. 825, 91 L. Ed. 1840, 67 S. Ct. 1316, the Court of Appeals for the Eighth Circuit referred to the **Curley** case as supporting the propositions that "Circumstantial evidence is sufficient to sustain a verdict when the facts and circumstances are such as legitimately tend to sustain an inference of their existence." (Our emphasis.)

lied upon by petitioner here (Petition, p. 15, note 10) the Court added:

> "We have applied these principles repeatedly in allowing the jury to draw **rational** inferences from facts in evidence" (134 F. 2d, l. c. 364). (Emphasis added.)

Thus, the Court did pass on whether there was a "substantial" basis for the inferences drawn by the jury and on whether those inferences were "logical", "natural" or "rational"—which is the rule of reasonableness applied by the appellate court in the case at bar.

It is even more obvious that the **Yoffe** case offers no support to the government's contention.

These decisions are not in conflict with the traditional rule of the scope of appellate review, which involves passing on the **reasonableness** of the inferences to be drawn from circumstantial evidence. **American Tobacco Co. v. United States** (C. C. A. 6, 1944), 147 F. 2d 93, 101, aff. (1946) 328 U. S. 781, 90 L. Ed. 1575, 66 S. Ct. 1126.

Thus, in **United States v. Litberg** (1949), 175 F. 2d 20, 21, the Court of Appeals for the Seventh Circuit reversed a conviction on the ground of insufficient evidence, stating the rule:

> "On the one hand, we must keep in mind the oft repeated rule that the weight and credibility to be attached to testimony of the witnesses is a matter for the trier of the facts and that we are required to take that view of the evidence most favorable to the government. On the other hand, while the trier of the facts is entitled to draw all reasonable inferences from the circumstances in proof, **a court of review is charged with the responsibility of determining the reasonableness of such inferences.** In other words an

inference may not properly be relied upon in support of an essential allegation if an opposite inference may be drawn with equal consistency from the circumstances in proof." (Our emphasis.)

Similarly, the Third Circuit reversed a conviction in **United States v. Laffman** (1945), 152 F. 2d 393, 394, reiterating the rule that:

> "'In order to justify a conviction of crime on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt.' United States v. Russo, 3 Cir., 1941, 123 F. 2d 420, 423. Accord: United States v. Tatcher, 3 Cir., 1942, 131 F. 2d 1002."†

To the same effect, **Turinetti v. United States** (C. C. A. 8, 1924), 2 F. 2d 15, 17, where, reversing a conviction, the Court said:

> "Whenever a circumstance, relied on as evidence of criminal guilt, is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference, guilt may be fairly deducible."*

See, in accord, the Tenth Circuit in **Estep v. United States** (1943), 140 F. 2d 40, 45, and in **Scott v. United States** (1944), 145 F. 2d 405, 408, cert. den. 323 U. S. 801, 89 L. Ed. 639, 65 S. Ct. 561. The analogous rule was asserted by the Fourth Circuit in civil cases.**

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† See also, in a civil suit, **Schad v. 20th Century-Fox Film Corp.** (1943), 136 F. 2d 991, 996.

* The same rule was asserted by that Court in **Peightel v. United States** (1931), 49 F. 2d 235, 240; **Tingle v. United States** (1930), 38 F. 2d 573, 575, and in **Dickerson v. United States** (1927), 18 F. 2d 887, 893.

** **Appalachian Electric Power Co. v. N. L. R. B.** (1938), 93 F. 2d 985, 989, cited with approval by this Court in **National Labor Relations Board v. Columbian Enameling & Stamping Co.**, 306 U. S. 292, 300, 83 L. Ed. 660, 59 S. Ct. 501, and **Eastern Coal Corp. v. N. L. R. B.** (1949), 176 F. 2d 131, 136.

The same principle is aptly expressed in a well considered opinion of the Court in **United States v. Gasomiser Corporation** (D. C. Dela. 1947, reh. den. 1948), 7 F. R. D. 712. Rejecting the identical contention which is urged here by the government, the Court said:

> "* * *, it should first be stated that in applying the 'circumstantial evidence rule' the court accepts all of the government's evidence as true and looks at it in the light most favorable to the government. But the court does not draw **all possible inferences** in favor of the government; it rather draws **all inferences reasonably deducible** from the evidence taken in the light most favorable to the government. See Yoffe v. United States, 1 Cir., 1946, 153 F. 2d 570, 573.
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> * * * * * * *
>
> "It should be made clear, however, that while all the government's evidence is accepted as true, the court may very well look to the defense evidence for the purpose of ascertaining a reasonable hypothesis other than guilt" (7 F. R. D., l. c. 720, 721).

As stated long ago by the Eighth Circuit in **Union Pacific Coal Company v. United States** (1909), 173 F. 737, 740:

> "There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. * * * and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction. Vernon v. United States, 146 Fed. 121, 123, 124, 76 C. C. A. 547, 549, 550; United States v. Richards (D. C.), 149 Fed. 443, 454; Hayes v. United States (C. C. A.), 169 Fed. 101, 103; United States v. Hart

(D. C.), 78 Fed. 868, 873, affirmed in Hart v. United States, 84 Fed. 799, 28 C. C. A. 612; United States v. M'Kenzie (D. C.), 35 Fed. 826, 827, 828; United States v. Martin, 26 Fed. Cas. 1183, 1184 (No. 15,731); People v. Ward, 105 Cal. 335, 341, 38 Pac. 945; People v. Murray, 41 Cal. 66, 67; State v. Hunter, 50 Kan. 302, 32 Pac. 37; Bradshaw v. State, 17 Neb. 147, 22 N. W. 361, 366."‡

The Eighth Circuit does not stand alone, but follows the overwhelming weight of the authorities:

First Circuit: **Roukous v. United States** (1912), 195 F. 353, 361, cert. den. 225 U. S. 710, 56 L. Ed. 1267, 32 S. Ct. 840.

Second Circuit: **Nosowitz v. United States** (1922), 282 F. 575, 578; **Romano v. United States** (1925), 9 F. 2d 522, 524.

Third Circuit: **McLaughlin v. United States** (1928), 26 F. 2d 1, 3; **Nicola v. United States** (1934), 72 F. 2d 780, 786; **Wiener v. United States** (1922), 282 F. 799, 801; **Yusem v. United States** (1925), 8 F. 2d 6, 8; **Ridenour v. United States** (1926), 14 F. 2d 888, 892-3; **Grant et al. v. United States** (1931), 49 F. 2d 118, 119-120; **Graceffo v. United States** (1931), 46 F. 2d 852, 853.

‡ This fundamental rule, which is expressly recognized in the **Yoffe** case (153 F. 2d, l. c. 572-3), relied upon by petitioner here (Petition, p. 15, note 10), has been reasserted in an impressive series of consistent decisions of the Eighth Circuit:

Sullivan v. United States (1922), 283 F. 865, 868;
Willsman et al. v. United States (1923), 286 F. 852, 856-7;
Grantello v. United States (1924), 3 F. 2d 117, 118;
Edwards v. United States (1925), 7 F. 2d 357, 360;
Bishop v. United States (1926), 16 F. 2d 410, 416-7;
Van Gorder v. United States (1927), 21 F. 2d 939, 942;
Salinger v. United States (1927), 23 F. 2d 48, 52;
Beck v. United States (1929), 33 F. 2d 107, 112;
Gold v. United States (1929), 36 F. 2d 16, 32;
Spalitto v. United States (1930), 39 F. 2d 782, 784;
Read v. United States (1930), 42 F. 2d 636;
Cravens v. United States (1932), 62 F. 2d 261, 274;
Gargotta v. United States (1935), 77 F. 2d 977, 981;
Wesson v. United States (1949), 172 F. 2d 931, 933.

Seventh Circuit: **Karchmer v. United States** (1932), 61 F. 2d 623.

Tenth Circuit: **Parnell v. United States** (1933 on rehearing), 64 F. 2d 324, 329; **McClintock v. United States** (1932), 60 F. 2d 839, 842.

Court of Appeals, District of Columbia: **Hammond v. United States** (1942), 75 U. S. App. D. C. 395, 127 F. 2d 752, 753; **Cady v. United States** (1923), 293 F. 829.

This is the general rule stated in 16 C. J. 763:

> "In order to sustain a conviction on circumstantial evidence, all the circumstances proved must be consistent with each other, consistent with the hypothesis that accused is guilty, and at the same time inconsistent with the hypothesis that he is innocent, and with every other rational hypothesis except that of guilt."

These authorities clearly support the rule of law adopted by the Appellate Court below. Let us now review briefly the evidence to which the rule was applied.

3. Applying the above rule to the case at bar, the Appellate Court was justified in holding that there was no substantial evidence of respondent's guilt, considering the proven circumstances in a light most favorable to the government.

The case was presented by the government on circumstantial evidence, the government admitting that it "has no evidence of an express written or oral agreement among the defendants" (R. 22 and 71).

The circumstantial evidence consisted of the uniformity of the retail and wholesale prices charged by the corporate defendants for Grade A regular fluid milk sold by them in the St. Louis area, and of the proximity in time

of the price changes listed in the Indictment, Bill of Particulars and Supplements. In addition, the government showed certain conversations between two employees of the respondents concerning price announcements, in the period August, 1939—August 28, 1941 (not later), (R. 248-250). No other evidence was introduced by the government and its case is therefore entirely based on the inferences drawn from those facts.

A. **No reasonable inference of respondent's guilt to the exclusion of its innocence could be drawn from the uniformity of the retail and wholesale prices charged by the two dairies for Grade A milk and from the proximity in time of their price changes, since the unrefuted positive evidence showed that those changes were dictated exclusively by impelling economic reasons, flowing from the undisputed facts that the cost factors for producing Grade A milk are substantially identical for both dairies, that Grade A milk is a standardized product sold in a tight market, and that those prices were decided upon by respondent in the exercise of its independent business judgment.**

a. **Each one of the price changes made by respondent, and in issue here was dictated exclusively by impelling economic reasons, and was decided upon by respondent in the exercise of its independent business judgment. This is the undisputed fact of all the direct evidence.**

The undisputed testimony in the record shows that the matter of price changes was most thoroughly analyzed by the management of respondent, consisting of the President, Lide, the Vice-President, Versen, the Comptroller, Reinhart, and the Sales Manager, Gee, at regular meetings at which the economic factors bearing on costs were scrutinized and discussed (R. 235, 304, 377-378, 390-391). It was only after a complete evaluation of the above eco-

nomic conditions and factors that price changes were arrived at by the President of the company, Lide, who alone had authority to make price decisions (R. 70, 80, 234, 237, 303, 384-5, 482). This was done on the basis of all available information, and of the cost accounting and allocation system followed by respondent for some ten years before the return of the indictment here (R. 374) and conforming to the system established by the International Association of Milk Dealers (R. 377, 339).

As the Appellate Court properly remarked:

> "All this evidence is undisputed and the integrity of the cost accounting and allocation system used by appellants and the correctness of the conclusion reached is not challenged by any direct evidence" (R. 656, 178 F. 2d, l. c. 367-8).

Following that system, the Comptroller collected for the trial the data pertinent to the cost allocations on Grade A milk (R. 394-395). These data were checked by a staff of independent and nationally known auditors which had audited the company's books since 1940 (R. 336, 367, 339), and are incorporated in a detailed cost analysis introduced in evidence as St. Louis Dairy's Exhibit C (R. 347-360).

Summarizing the data broken down in said Exhibit C, **Comptroller Reinhart** prepared and testified from Exhibit G (R. 466) to the effect that, after the last maximum prices for consumers fixed by the government under O. P. A. (June, 1946), the total price increases made by St. Louis Dairy until and including February 5, 1948 amounted to **5½ cents a quart** (R. 467-468), whereas the total increase of respondent's costs for labor and materials during that period was **6 cents and a fraction** (R. 469).

That evidence and testimony is undisputed in this case, thus fully justifying the conclusion of the Appellate Court:

"It appears without dispute that the increases in the price of milk charged by the appellants was somewhat less than the increase in the cost of purchasing and processing the product" (R. 656, 178 F. 2d, l. c. 367).

This fact alone would seem sufficient to dispel any inference of conspiratorial agreement among defendants to fix prices. This is particularly true in view of the additional charge in the Indictment that the conspiracy had the intended effect of "**increasing** * * * prices to consumers and other purchasers of fluid milk sold by the corporate defendants" (Indictment, paragraph 14, R. 9; our emphasis).

This is not a proper situation for certiorari. The case turned on its own peculiar facts. A detail explanation was furnished by the defendants' witnesses as to every single one of the price changes included in the government's charges (R. 249, 308-320). The oral testimony was supported by ample documentation and was not claimed by anyone to be unreasonable or beyond the normal course of business in any respect. There was no countervailing evidence received or offered, either in rebuttal or by means of cross-examination.

Thus, unlike the **American Tobacco** and other anti-trust cases in which convictions were sustained on appeal,* in the case at bar there was economic justification for each one of the price changes made by respondent, and that evidence is undisputed. Therefore, the Appellate Court properly concluded that:

". . . each increase which is specifically charged either in the indictment or in the bill of particulars is rationally explained and accounted for and shown

* **American Tobacco Co. v. United States** (1946), 328 U. S. 781, l. c. 804, 90 L. Ed. 1575, l. c. 1591, 66 S. Ct. 1126.

to have resulted from economic conditions which increased the cost of processing and distributing, and, as before suggested, this evidence is wholly without contradiction" (R. 657, 178 F. 2d, l. c. 368).

b. **Grade A milk being a standardized product sold in a tight market, and its cost items being substantially identical for both respondents, uniformity in prices and price changes is bound to result from those identical economic forces.**

The undisputed evidence in the case bears out fully the above proposition. The **shortage of milk** in the St. Louis area was established by Government witnesses (R. 143, 157, 177, 235), and was confirmed by independent witnesses (R. 442, 459). It is undisputed in the record, as is the fact that the product is fully and completely **standardized** by virtue of the St. Louis Milk Ordinance. This fact was established by testimony of experts* and no rebuttal evidence was furnished by the Government. Consequently the Appellate Court was entitled to conclude that

> "The milk as handled by appellants was a standardized product" (R. 657, 178 F. 2d, l. c. 368).

The evidence showing basic **identity of the cost factors** was reviewed in the Statement, supra. Here again, taking the record as a whole, there is not a scintilla of evidence in it to disprove the basic equality of the cost factors for respondent and its competitor Pevely. Nor in the very nature of these operations could there be.

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* Judson P. Mason testified as follows:

"There is a very little difference in the milk of one dairy as to another, standard products as to butter fat tests, bacterial contents and other uniform requirements.

Q. Other factors that are brought into uniformity through the Health Department in the working out of its ordinance? A. That's right" (R. 445).

Likewise Father Leo C. Brown stated:

"* * * speaking of the Grade A milk market * * * we have here a highly standardized product, the product of one dealer being the same as the product of another dealer" (R. 455).

The conclusion is inescapable: the cost factors being the same, how could the price be different for the same standardized product in a highly competitive market, where the supply is inadequate? There is undisputed testimony that the market is highly competitive (R. 446-447, 472, 322), and both economists who testified in the trial agreed that in such a market as the one involved here, with few sellers, a standardized product, and identical cost factors,

> "I would expect practically uniformity of price, with slight exceptions, and practically simultaneous change in price" (Father Brown: R. 457);
>
> "* * * if somebody breaks under that [same] pressure by raising prices, you will find normally that other handlers will come up and meet it in a tight market" (Mason: R. 446).

The testimony of these independent experts and economists is fully supported by the standard and most authoritative treatises on the subject, some of which are summarized in the opinion of the Appellate Court (R. 657-8; 178 F. 2d, l. c. 368-9).

The Government's theory that uniformity in prices and identical pattern in price changes is tantamount to an agreement to fix prices and that similar action is identical to concert of action seems to accept the spurious doctrine of "conscious parallelism." This doctrine by identifying uniformity of prices with an agreement to fix prices results in denying to business men the right to take into account in their price policies the prices of their competitors and to anticipate, and react to, expected price changes by others. That doctrine denies one of the elements of free enterprise in a self-styled attempt to protect it. To carry it to its logical conclusion, the doctrine results in forcing artificial **price dissimilarity**, in order that business men

may escape the danger of anti-trust prosecutions. If that doctrine were accepted by the courts it would then become a matter of judicial determination which seller was thereafter to sell at the lower price and which at the higher price—which buyer would have the privilege of buying at less cost and which at the higher. As the above quoted economists state from their scholarly analyses of price trends in free markets, prices ordinarily level off and, after the changes due to cost adjustments, show a pattern of uniformity for the same standardized product in the same tight market where a few sellers sell to a large mass of informed buyers. As the decision below points out, "These economic principles must of necessity be recognized by the courts" (R. 658; 178 F. 2d, l. c. 369).

Thus, in **Cement Mfrs. Protective Ass'n v. U. S.** (1925), 268 U. S. 588, 69 L. Ed. 1104, this Court reversed the judgment of the District Court granting a perpetual injunction for violation of the Sherman Act. In rendering the opinion Justice Stone* stated, inter alia:

> "* * * the fact is that any change in quotations of price to dealers promptly becomes well known in the trade through reports of salesmen, agents, and dealers of various manufacturers. **It appears to be undisputed that there were frequent changes in price, and uniformity has resulted not from maintaining the price at fixed levels, but from the prompt meeting of the changes in price by competing sellers.**
>
> "It is urged by defendants that such uniformity of prices as existed in the trade was due to competition. They offered much evidence tending to show

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* The recent Supreme Court decision in **Federal Trade Commission v. The Cement Institute et al.** (1948), 333 U. S. 683, 92 L. Ed. 1010, in no way can be said to have detracted from the authoritative value of the "Old Cement case," which is there expressly and repeatedly distinguished:

> "The court's holding in the Old Cement Case would not have been inconsistent with a judgment sustaining the Commission's order here, even had the two cases been before this Court the same day" (l. c. p. 708).

complete independence of judgment and of action of defendants by large expenditures in competitive sales efforts and by variations in the volume of their production and shipment, earnings and profits. A great volume of testimony was also given by distinguished economists in support of the thesis that, in the case of a standardized product sold wholesale to fully informed professional buyers, as were the dealers in cement, uniformity of price will inevitably result from active, free, and unrestrained competition, and the **Government, in its brief, concedes that 'undoubtedly the price of cement would approach uniformity in a normal market in the absence of all combinations between the manufacturers'** " (268 U. S., l. c. 605-6, 69 L. Ed., l. c. 1111-1112). (Our emphasis.)†

In **U. S. v. Sugar Institute** (D. C. N. Y., 1934), 15 F. S. 817, 887, which was a suit in equity under the Sherman Act, the Court reviewed the alleged agreement on basic prices and the general effect of the Institute on price levels, and stated:

"The evidence shows that defendants' product is in all respects a standardized product; uniformity of basic price in any given area is therefore to be expected under a regime of free competition. Cement Mfrs. Protective Ass'n v. U. S., 268 U. S. 588, 605, 606, 45 S. Ct. 586, 69 L. Ed. 1104 (1925)."

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† Note also the following language:

"We realize also that uniformity of price may be the result of agreement or understanding, and that an **artificial price level**, not **related to the supply and demand of a given commodity**, may be evidence from which such agreement or understanding, or some concerted action of sellers operating to restrain commerce, may be inferred" (268 U. S., l. c. 606, 69 L. Ed., l. c. 1112). (Our emphasis.)

The above passage is highly significant. Before uniformity of prices may become evidence of a conspiracy, those prices must be shown to be "artificial" and "not related to the supply and demand of a given commodity." The whole evidence in this case is unequivocally to the contrary.

The principle thus announced by the District Court was in no wise modified by this Court when it reviewed that decision. 297 U. S. 553, 600, 80 L. Ed. 859, 877, 56 S. Ct. 629.

In **United States v. International Harvester Co.** (1927), 274 U. S. 693, 71 L. Ed. 1302, it was contended that the defendant was violating the Sherman Act in that, inter alia, it dominated the interstate trade in harvesting machinery by the compulsory regulation of prices. Rejecting this contention, this Court said, l. c. pp. 708-9:

> "The most that can be said as to this is that many of its competitors have been accustomed, independently and as a matter of business expediency, to follow approximately the prices at which it has sold its harvesting machines; but one of its competitors has habitually sold its machines at somewhat higher prices. * * * And the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination."

In **United States v. Standard Oil Company of New Jersey** (D. C., E. D. Mo., 1931), 47 F. 2d 288, the Court, in a decision of three circuit judges, made clear that no restraint on competition is to be inferred from uniformity of prices arising out of price leadership. Thus the Court said, l. c. 316-317:

> "* * * if the major companies follow the Socony prices in this area, they do so because they do not wish to engage in a price-cutting war which might entail losses to all concerned (including Socony) without any compensating benefits. Such a view has no sinister aspect, but is merely a matter of business judgment and prudence illustrated in every community in the country by retail competitors in all lines

[citing authorities]. Grocers, butchers, and all other lines in the same markets, generally sell the same things at the same prices, for the sound reasons that they wish to get all they can, that they cannot get more than the price at which the bulk of what is sold in their respective markets is selling, and that they do not think it wise to cut prices."

In the case at bar the evidence reviewed above and these authorities fully support the conclusion of the Appellate Court that:

> "We are clear that mere uniformity of prices in the sale of a standardized commodity such as milk is not of itself evidence of a violation of the Sherman Anti-Trust Act" (R. 659; 178 F. 2d, l. c. 369).

c. **The price changes in question were not simultaneous, nor were the price changes initiated always by the same respondent.**

The dates at which the price changes of the dairies became effective and the dates on which each respondent ordered from its printer the new price announcement are stipulated in the record (R. 546-547, 564-565), and, for the convenience of the Court, are summarized in the following tabulation:

St. Louis Dairy Company		Pevely Dairy Company	
Date Price Change List Received by Printer	Date Price Change Effective	Date Price Change List Received by Printer	Date Price Change Effective
7/ 3/46, 4:30 P. M.	7/ 4/46	7/ 2/46	7/ 3/46
7/ 8/46, 6:30 P. M.	7/ 9/46	7/ 9/46	7/10/46
10/ 4/46, 11:00 A. M.	10/ 5/46	10/ 3/46	10/ 4/46
1/17/47, 8:30 A. M.	1/20/47	1/20/47 (copy delivered Pevely same day)	1/20/47
7/30/47, 5:00 A. M.	8/ 1/47	7/25/47 (copy delivered Pevely July 29)	8/ 1/47
9/11/47, 4:00 P. M.	9/16/47	9/15/47, 9:15 A. M.	9/16/47
1/26/48, 9:00 A. M.	1/28/48	1/23/48 (delivered same day)	1/27/48

The dates appearing in bold type in the foregoing tabulation indicate which company initiated the price change, and they clearly dispel not only the charge that the price changes were simultaneous, as the government claimed, but also any suggestion that the same respondent was taking leadership in the price pattern, as occurred, for instance in the **American Tobacco** case.* It will be borne in mind that there were a varying number of other competing handlers in the area, averaging about thirty in normal times (R. 137, 445), and that these figures of the two largest ones are selected out of the field because these two alone were indicted and charged.**

The above facts and dates having been stipulated by all parties, the position of respondents in this case is stronger than the position of defendants in **United States v. Standard Oil Company of New Jersey**, supra, l. c. p. 316, where the Court referred to the fact that the prices of the major oil companies were changed at close to the same time, and stated:

> "The reasons for such uniformity as exists are not far to seek * * *. While there is sharp conflict in the evidence as to which company first makes changes in prices, it is evident that Socony could do so, and, if that change were a reduction, its competitors, generally speaking, would be compelled to follow that lead. 'But even if it be taken that others, in this area, 'follow' (in the above sense) the Socony prices, that is not governing, because there is no element of compulsion or attempt at compulsion present, although it is, as contended, proof of its business power in this area."

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* American Tobacco Co. v. United States, supra, l. c. 804.

** Thus, there is no basis whatever in the record for the statement of petitioner (Petition, p. 10) and of the trial court that "Of all the dairies in St. Louis only the two defendants could fathom with such minute exactitude as to date and amount when and in what amount the two defendants would make a price change" (79 F. S. 12, 18). Since only two dairies were indicted and the evidence was circumscribed to them alone, the assertion of the trial court and of petitioner belongs to the realm of speculations and assumptions and is wholly unwarranted by the evidence.

Let us analyze a few of the price changes tabulated above. The first one was ordered by Pevely on July 2, 1946, effective on the 3rd. What is the undisputed testimony as to St. Louis Dairy? That testimony is that St. Louis Dairy did not order a price change notice to its printer until July 3rd, at 4:30 P. M., effective the following day. On July 8, 1946, St. Louis Dairy ordered a new price announcement to its printer, effective on the following day. Obviously, Pevely knew nothing about it at that moment, as it is only on the 9th that it ordered to its printer a price change notice effective not on the same, but on the following day.

On July 25, 1947, Pevely ordered its price change schedule, which was delivered to it on July 29th. It was only on the 30th that St. Louis gave the order to the printer, that is, **five days** after Pevely's order. The September price change shows that **four days** elapsed between the price change orders of the two dairies and **three days** are involved in the January, 1948, change. Had there been a conspiracy to fix prices, as charged, why this time lag? There is one common feature to all three instances, namely, that the dairy which followed the leadership of the other was able to give its price list to the printer **only 24 hours** before the other's prices became effective—a fact which is clearly explained considering the availability of that information through wholesale stores (which receive the list prior to its effective date), newspaper publicity through news items of announced price changes, or other media of discovery. There is reason for the dairy's policy of secrecy as to proposed price changes so far as its customers are concerned, since customers' buying and ordering practices might be altered by advance notice of future prices.

The Petitioner argues that the alternating of the two appellants in initiating the price changes is further evidence of the prearranged scheme and of the conspiracy (Petition, p. 4, footnote 3). In this argument Petitioner

is illogical. It would be more reasonable to suppose that if there were a conspiracy and an effective scheme were devised to create favorable appearances, a less obvious synchronization would have been resorted to. The tabulation of the printers' orders shows unmistakably the lack of any preconcerted plan of action. It is proof of the fact that the dairy following the leadership of its competitor without advance knowledge of the price changes either at the time they were decided upon or even at the time the new price list was transmitted to the printer.

The tabulation conclusively shows that in no instance were lists of price changes ordered by respondents from their printers on the same day. The gap between the dates on which the price lists were ordered is most revealing. After the printer delivered the list to its dairy, there was opportunity for the alert agents and employees of the other respondent to pick up the list or the information contained in it from many possible sources as they were urged to do (R. 238-9, 314). In one instance, as many as five days elapsed before the other dairy ordered its price changes. Would this be the practice of two participants in an agreement to fix prices—an agreement which necessarily requires the meeting of the minds on those price changes?

No detail oral testimony supplementing these documents with the outside concurrent memory of witnesses appears in the record, to be sure. In the rush and hurry of the day to day conduct of the dairy business it would not be expected that such evidence would be available for remote periods. But the records of the printer happily were intact, and they enable the Court to perceive how it was done.

This evidence is properly summarized by the Appellate Court in the following sentences:

"It is to be observed too that the price changes in question were not simultaneous. Neither were the changes uniformly initiated by the same appellant" (R. 659; 178 F. 2d, l. c. 369).

No inference of agreement arises from these facts. On the contrary the conclusion is inescapable that the timing in the price changes as to the period in which the pertinent records were available fully disproves any suggestion or inference of conspiratorial agreement or concerted action by respondents, both of which were subject to the same economic pressures operating in the same tight St. Louis milk market whereby prices of their standardized product are irresistibly driven to uniformity.

It is significant that petitioner has not cited any case even remotely involving a comparable situation, in which a conviction for violation of the Sherman Act was sustained on evidence of price uniformity and of close time proximity in price changes. As for **Davis v. United States** (C. C. A. 6, 1901), 107 F. 753, 755, quoted by the District Court below in the passage reproduced at p. 10 of the Petition, the evidence there is so far removed from that of the case at bar that any comment to distinguish it would be supererogation on our part.

Under the authority of the decisions reviewed above, it is clear that the evidence in this case fully justified the conclusion of the Appellate Court that no reasonable inference of respondent's guilt, to the exclusion of its innocence, could be drawn from the proven circumstances. If two inconsistent inferences might be logically possible, the evidence was insufficient to sustain the conviction, and to overcome the presumption of innocence which is the guiding star of our criminal law system. As this Court

said in **Lilienthal's Tobacco v. United States** (1878), 97 U. S. 237, 266, 24 L. Ed. 901, 905:

> "* * * in criminal trials the party accused is entitled to the legal presumption in favor of innocence, which, in doubtful cases, is always sufficient to turn the scale in his favor."

B. No reasonable inference of respondent's guilt to the exclusion of its innocence could be drawn from the remote conversations between Gee and Wasser who appeared as government witnesses, and who by direct, unimpeached, uncontradicted and reasonable testimony denied any conspiracy.

Petitioner (Petition, pp. 5, 9 and 11) and the District Court below (79 F. S., l. c. 17-18) laid great emphasis upon the conversations between Gee and Wasser in the remote period of August, 1939, until August 28, 1941. These conversations involve **four** instances (R. 246-250, 262) out of the seven price changes complained of by the government in that period and of the fourteen charged for the whole ten years. To prove those conversations Gee and Wasser were called as government witnesses. Gee and Wasser were examined by government's counsel from the transcript of their testimony before the Grand Jury in 1942, which was fully used to refresh Gee's recollection (R. 263-4). They both admitted having given to each other information concerning price changes decided upon by the respective companies before the date the change went into effect, but **in no instance was any information concerning any contemplated price changes given by either respondent before the price change had been decided upon** (R. 227, 228, 233-4, 246-250). This was the natural position, since neither of them had any authority to fix prices, or announce a price change until after its determination by the responsible heads of their companies.

Petitioner (Petition, p. 11) questions the reason for the exchange of information between Gee and Wasser. But it takes no economist to know that every competitor is interested in the price policy of the others, and when no harm results from the mutual disclosure of that information, why should the direct exchange be avoided? In their normal and natural perspective those conversations do not have any of the sinister connotations that the government is trying to insinuate. When that source of information was eliminated in August, 1941, because its propriety was being questioned (R. 230, 254), other media were resorted to, and notice of price changes, in advance of their effective dates was obtained through newspapers, price lists left at stores, etc. (R. 238-239, 247). Petitioner's purported analogy (Petition, p. 11) of a meeting at which A says, "I am going to raise my price 10 cents next week" and B says, "I will, too"—which the government claims to be another form of conspiratorial price fixing—is simply inapplicable to the present situation. There is no evidence of either one of the sales managers saying, "I will, too". It is undisputed that neither Gee nor Wasser had authority to fix prices for their respective companies (as to Wasser: R. 229, 230, 231; as to Gee: R. 234, 235, 237, 303, 384-5, 482).

Moreover, in the course of their testimony, the existence of any conspiratorial agreement was positively and emphatically denied:

> "Now, Mr. Gee, in connection with any of these price changes, as Sales Manager for the St. Louis Dairy Company, did you ever agree with Mr. Wasser or anybody, any competitor, to a price change or price increase? A. I most certainly did not.
>
> "Q. Ever in your life? A. Never" (R. 256; see also R. 229).

This testimony, which is fully supported by the other employees and officers of respondent (R. 393-4, 479-81, 322), is binding on the government, which chose to call Gee and Wasser as witnesses. In the teeth of these positive denials of agreement, the petitioner asserts that a conspiratorial agreement may be inferred from their testimony (Petition, pp. 8-11, 15).

Rejecting this contention, the Appellate Court pointed out:

> "The evidence is undisputed that they did not make any agreement with reference to the fixing of prices and it is equally undisputed that they did not communicate the knowledge of the changes determined upon by reason of any agreement between the dairy companies. This testimony, we think, forms no basis for a legitimate inference of the making of or participation in any sort of a conspiracy for the fixing of prices" (R. 659; 178 F. 2d, l. c. 369-370).

The Appellate Court refers to its previous decision in **Cartello v. United States** (1937), 93 F. 2d 412, 415, wherein the Court stated inter alia:

> "It is argued that these ballots could have been erased in the very presence of the government witnesses Lemon and Lynch without their knowledge, but the evidence is to the contrary and convictions cannot be sustained on mere possibilities. Had these witnesses, with personal knowledge, not been placed upon the witness stand by the government, there might be some room for suspicion or surmise that this had been done, but the government has itself proven that although the ballots were altered, they were not altered by either of the defendants at this polling place. Ordinarily, a litigant is bound by the testimony of his own witnesses, especially if that testimony is uncontradicted and there is no claim of mistake. Wiget v.

Becker (C. C. A. 8), 84 F. 2d 706; Gold v. United States (C. C. A. 8), 36 F. 2d 16; Yellow Cab Co. v. Rodgers (C. C. A. 3), 61 F. 2d 729; Jacobson v. Hahn (C. C. A. 2), 88 F. 2d 433, 435."

The rule that the litigant is bound by the testimony of his own witnesses, especially if their testimony is uncontradicted and there is no claim of mistake, is not challenged anywhere by petitioner. As the citations of authorities in the **Cartello** case indicate, this rule has been consistently followed in the 8th Circuit. See also **Heard v. United States** (1919), 255 F. 829, 832. It is not only the rule of the 8th Circuit but it is also recognized by the 2nd Circuit, **Jacobson v. Hahn et al.** (1937), 88 F. 2d 433, by the 3rd Circuit, **Yellow Cab Co. of Philadelphia v. Rodgers** (1932), 61 F. 2d 729, and, seemingly, by the 5th Circuit in **Young v. United States** (1938), 97 F. 2d 200, 202, reh. den. 97 F. 2d 1023.

Furthermore, as the Appellate Court pointed out, "Inferences which are contrary to established facts may not be drawn from mere conjecture and an unwillingness to believe the unimpeached and uncontradicted testimony of witnesses" (R. 659-660; 178 F. 2d, l. c. 370).

This rule has been followed by the 8th Circuit for a long time. See, e. g., **Ezzard v. United States** (1925), 7 F. 2d 808, 811. In agreement is the 5th Circuit. Thus, in **Texas Co. v. Hood et al.** (C. C. A. 5, 1947), 161 F. 2d 618, 620, cert. den. 332 U. S. 829, 92 L. Ed. 403, 68 S. Ct. 206, the Court quotes with approval its prior decision in **Arnall Mills v. Smallwood** (1933), 68 F. 2d 57, 59, as follows:

> "Although the circumstances may support the inference of a fact, if it is shown by direct unimpeached, uncontradicted, and reasonable testimony which is consistent with the circumstances that the fact does not exist, no lawful finding can be made of its existence."

The rule has been applied also by this Court. In **Pennsylvania R. R. Co. v. Chamberlain** (1933), 288 U. S. 353, 340-1, 77 L. Ed. 819, 823, 53 S. Ct. 391, it is stated:

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist."

This conclusion is supported by a long list of precedents which are recited in the opinion. It was followed by an impressive series of decisions.* The fact that these are civil cases does not detract in any way from their authority as precedents in a criminal case. Rather a fortiori, the rule should apply to a criminal proceeding where the rules of evidence are more strictly applied against the prosecution, recognizing the presumption of innocence in favor of the defendant.

These authorities fully warrant the conclusion of the Appellate Court that the testimony of Gee and Wasser,

> "forms no basis for a legitimate inference of the making of or participation in any sort of a conspiracy for the fixing of prices" (R. 659, 178 F. 2d, l. c. 370).

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* See, e. g., **Foran et al. v. Commissioner** (C. C. A. 5, 1948), 165 F. 2d 705, 707; **Tatt v. Commissioner** (C. C. A. 5, 1948), 166 F. 2d 697, 699; **Howell Turpentine Co. v. Commissioner** (C. C. A. 5, 1947), 162 F. 2d 319, 325, and **Winn v. Consolidated Coach Corp.** (C. C. A. 6, 1933), 65 F. 2d 256, 257.

III.

The Appellate Court Properly Held That the Judgment of the District Court Should Be Reversed Because of Prejudicial Evidence Received Over Objections of Respondent, and the District Court Erred in Not Striking That Evidence From the Record.

Petitioner assigns as error the holding of the Appellate Court that a new trial was required by the admission in evidence of certain prejudicial evidence showing (A) foreign control of respondent, and (B) the compensation paid to certain individual defendants (Petition, p. 8, number 6, and pp. 19-21).

A. The District Court admitted, over the objection of respondent (R. 79-80) the portion of government's Exhibit 3, which shows that all of the stock of respondent is owned by the National Dairy Products Corporation of New York (R. 80-1). Petitioner argues (Petition, p. 19) that the admission of that evidence was not prejudicial for the reason that "The trial court was careful to instruct the jury to disregard extraneous matters in reaching its verdict with respect to the corporate defendants (R. 607, 614)." The generic instructions given by the trial court at the cited pages of the record are in no way sufficient to erase from the record the evidence objected to by this respondent. Since the Court is the judge of the materiality and relevancy of the evidence, the jury may well take the instructions to disregard "extraneous matters" as meaning evidence which had not been admitted at the trial.

Petitioner apparently admits that the evidence it succeeded in introducing over respondent's objections was immaterial. That much being conceded, it is also clear that the evidence was prejudicial in that it pointed out

to the jury that respondent was a wholly owned subsidiary of a **foreign corporation.** The appellate court well knew, and was entitled to take judicial notice of, the fact that the case at bar had been tried extensively in the newspapers in advance of the trial below, and sensationally during the proceedings in court. Charges, countercharges, investigations by private and public groups and agencies had aroused public opinion, and the emphasis on the foreign character of the corporation which is in complete financial control of respondent was bound to and beyond a shadow of doubt did prejudice the jury. On the strength of the ruling of the trial court, the government's attorney in his closing argument was able to direct the jury's mind and emotions to that fact:

> "* * * there is no evidence, but I presume they [sic] were dividends paid to the **National Dairy Corporation**" (R. 581). (Our emphasis.)

Under similar circumstances the admission of such evidence was held prejudicial error. Thus, in Union Electric Light & Power Co. v. Snyder Estate Co. et al. (C. C. A. 8, 1933), 65 F. 2d 297, the defendant's counsel propounded questions relative to the ownership of the stock of plaintiff. The Court held that the admission of that evidence was prejudicial error, saying, l. c. pp. 302-303:

> "This cross-examination impressed upon the jury the size and extent of the holdings of plaintiff, the foreign character of the controlling factors of plaintiff, and that the ownership of substantially all the stock of plaintiff was in the North American Edison Company. * * *
>
> "These extraneous facts, if they are facts, served only to arouse the prejudice of the jury. * * *
>
> "This evidence not only took the jury far from the simple issue to be tried, but it distracted their attention from that issue, and brought before them the

size and wealth of plaintiff and its affiliates, and the above-quoted argument of defendant's counsel was calculated to keep fresh in the minds of the jury the size and wealth and foreign character of the plaintiff."

In the **Union Electric** case, the Court pointed out "the evidence was not overlooked in the counsel's argument to the jury" (l. c., p. 303). The same situation is present here, and it is earnestly submitted that the ruling of this Court in that case is controlling in the case at bar.

The case of **United States v. Socony-Vacuum Oil Co.** (1940), 310 U. S. 150, 239-243, relied upon by Petitioner (Petition, p. 20), is not in point here, for the reason that, as it appears from the opinion, the assignment of errors in that case was concerned with the argument to the jury by government counsel (310 U. S., l. c. 237), rather than with the ruling of the trial court in admitting the evidence. Moreover, in that case this Court emphasized the length of the trial, and specifically admonished: "But each case necessarily turns on its own facts" (l. c. 240).

B. In the course of the trial, counsel for the government laid great emphasis on the salaries paid to the Kerckhoff brothers, a highly prejudicial matter, which was bound to arouse the jury. The first attempt by counsel for the government was overruled by the District Court, but the message had already been conveyed to the jury in the question propounded by the government's attorney:

"Q. For instance, are you familiar with the salaries that are paid to each of these five Kerckhoffs? • • • You know they are paid, outside of bonuses—each is paid $3,000 a month, don't you?" (R. 233.)

At the second attempt by counsel for the government, the District Court overruled the objection of respondent's

counsel based on the grounds of prejudice and allowed evidence of the compensation paid to the Kerckhoffs (R. 539-541). At the close of all the evidence, respondent moved the Court to strike out, and instruct the jury to disregard, that evidence, but the District Court overruled the motion (R. 569).

True enough, the trial court instructed the jury not to be influenced by the salaries paid to certain officers of the dairies (R. 622-3), but since the Court had refused to order that evidence stricken and had overruled respondent's motion to that effect (R. 569) it is clear that a prejudicial error was committed. The inconsistent attitude of the District Court cannot be deemed to have been ignored by the jury. The present situation is therefore quite a little stronger than that in **O'Hara v. Lamb Construction Co.** (Mo. App., 1917), 197 S. W. 163, 165, where the Court said:

> "The red hot iron of prejudice has been thrust into the case; merely withdrawing it still leaves a festering wound."

The point was promptly capitalized and fully exploited by the government's attorney, who in his closing argument called the jury's attention to those salaries and bonuses:

> "These salaries of officers * * *" (R. 581).

Obviously what salaries Pevely Dairy pays or did pay its officers is a matter confined to its own business and management policy, but the "red hot iron of prejudice" was injected in the case to the irreparable detriment of this respondent.

Petitioner argues that "the only possible prejudice would have been to the individuals whose salaries were shown, all of whom were acquitted" (Petition, p. 21). Yet Petitioner pointed out also that "Some of the reasons

which may lead a jury to refuse to convict individuals are obvious. In the present case * * * there was a strong plea to the jury by counsel'' (Petition, p. 17, note 12). The theory of the government is apparently that the jury's verdicts—so obviously inconsistent in acquitting the individuals who fixed the prices for which the corporations were convicted—constituted a compromise. That theory is quite tenable, but it clearly points out the danger and prejudice resulting to all defendants from the admissions of immaterial prejudicial evidence. The mental and emotional processes of the jury are beyond the realm of investigation and judicial review, but, unless we are to ignore all realistic considerations, the conclusion is inescapable that the testimony of the Kerckhoffs' salaries and bonuses was highly prejudicial and ought to have been stricken from the record. The ruling of the District Court was error and the Appellate Court was fully warranted in so holding.

C. The District Court erred in admitting evidence covering the profits of the entire Milk Division of respondent, which includes products not involved in the case, and in overruling respondent's motion to strike that evidence from the record.

The trial court, over objections of respondent, admitted evidence of the profits of the whole Milk Division of the company (R. 324-329, 398-400). This division includes more than a dozen different products (R. 326-327, 379-380), whereas this case is confined to only one of those many kinds of milk products, namely, **Grade A regular**. At the close of the defendants' evidence counsel for the government offered Exhibits 43 and 44, containing the operating profit and loss statements for the whole Milk Division of St. Louis Dairy Company for the years 1946 and 1947 (R. 566). On objection by respondent the District Court ruled that those exhibits were inadmissible, remarking that the

government had failed in its purported purpose of using those exhibits on cross-examination of respondent's officers to impeach the accounting and cost allocation system used by the dairy (R. 567). Nevertheless the Court refused to instruct the jury to disregard the testimony previously read from those same exhibits, stating:

> "The Court will leave the record as it is" (R. 567).

Fortified by that ruling, counsel for the government closed his argument to the jury with an emphatic reference to the $317,383.76 profit shown by respondent Pevely Dairy Company on fluid milk during the period July, 1946, to January, 1948 (R. 583). That evidence was prejudicial and the ruling of the trial court refusing to strike that evidence from the record is a reversible error.

The government limited its charges to Grade A regular milk alone* and should be confined in its proof to the allegations of the indictment and bill of particulars together with its two supplements.

In a recent textbook by Housel and Walker "Defending and Prosecuting Federal Criminal Cases" (2nd Ed., 1947), p. 450, it is said:

> "Evidence offered by the government at the trial is limited by and must not conflict with the bill of particulars; if it does, on objection duly and seasonably made, its admission will be refused."

Thus, in **Braatelien et al. v. United States** (C. C. A. 8, 1945), 147 F. 2d 888, 892, the Court stated:

> "When the facts are detailed in a bill of particulars, he who furnishes it will be confined by the court

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* Prices and dates set forth in paragraph 13 of the Indictment, R. 8-9; Bill of Particulars, paragraph IV, R. 22; Second Supplemental Bill of Particulars, paragraph I, R. 62; Government's Exhibit 29, R. 241; and closing argument of government's counsel, R. 602.

to the proof of the facts so specified (citing authorities).”†

In the case at ba , not only was the government limited by its pleadings to Grade A regular milk alone, but the injection of evide ce concerning the aggregate profits made by responden on many other kinds of milk and on the other products old by its Milk Division was obviously prejudicial. It pres nted an extraneous and psychological issue, highly detrim ental to the rights of respondent.

Profits made by espondent, e. g., on orange juice (one of the many produc s sold by its Milk Division, R. 380), certainly have no b aring on the issue of whether or not respondent conspire l to fix prices of Grade A regular milk. Evidence of p ofits unrelated to the product in issue is as inadmissible a any other evidence of the wealth of a defendant. The ru e was stated on many occasions, that

> “To permit e idence of the wealth of a party litigant * * * is pr judicial error.” **Union Electric Light & Power Co. v. Snyder Estate Co.**, supra, l. c. p. 303.

The theory adva ced by the government counsel as qualifying this line f inquiry was that he was entitled to test the accuracy of the cost accounting allocations. But having elicited the information on this promise he left the subject and nev r again reverted to it (R. 324, 325, 567).

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† In accord: **Commonw alth v. Giles, 1 Gray (Mass.) 466; Kettenbach v. United States (C. C. Adams Express Co. (D. C. 9, 1913), 202 F. 377, 383; United States v. Gouled (D. C. N. Y., 191 Iowa, 1902), 119 F. 240, 242; United States v. N. Y., 1917), 245 F. 888, 8 , 253 F. 239; United States v. Pierce (D. C.).**

IV.

The Appellate Court Did Not Hold, as Suggested by Petitioner, That (A) the Statute of Limitations Applied to the Case at Bar, Nor That (B) the Jury's Verdicts of Conviction Were Discredited by the Verdicts of Acquittal.

A. Petitioner asserts that the Appellate Court was laboring under a misconception of law concerning the applicability of the statute of limitation to the case at bar (Petition, p. 18). A reading of the opinion shows the error of the government. The Court below did neither hold nor suggest that the three-year statute of limitation applies here. The Court remarked that the O. P. A. controls from 1943 to 1946 did break the continuity of the conspiracy which is pleaded in the indictment as covering a ten-year period. The Court went on to suggest that anything which transpired during the first period, "if charged as separate offense," would ordinarily be barred by the three-year statute of limitations (R. 660-1, 178 F. 2d, l. c. 370). This argumentative remark of the Court is clearly in the nature of an **obiter** and could be carved out of the opinion without in any way detracting from its logic, coherence or integrity. Petitioner does violence to the unequivocal language of the opinion in stating that the Appellate Court "assumed that the usual three-year statute of limitation would bar conviction of charges based upon the evidence of the price conferences (all of which occurred during or before 1941)" (Petition, p. 18).

Moreover, the whole paragraph of the Court's opinion discussing the two separate periods of the conspiracy was in the nature of dictum as was irrefutably indicated by its beginning with the words "in passing". That expression clearly indicates that the Court was going by, beyond

or departing* from the major issue before it, namely, whether there was any substantial evidence to support respondent's conviction. "In passing" introduces parenthetic or incidental considerations which by no stretch of the imagination can be considered essential to the rationale of the decision.

The rule is well established that general expressions in an opinion which are not essential to dispose of the case are merely dicta: **Watson v. St. Louis, I. M. & S. R. R. Co.** (C. C. Ark., 1909), 169 F. 942, 945, aff. 223 U. S. 745, 56 L. Ed. 639, 32 S. Ct. 533; **Coen v. American Surety Co. of N. Y.** (C. C. A. 8, 1941), 120 F. 2d 393, 400, cert. den. 314 U. S. 667, 86 L. Ed. 534, 62 S. Ct. 128; **People v. Altice Case** (1922), 222 Mich. 379, 190 N. W. 289.

B. Analogous considerations apply to the other contention of Petitioner that the Appellate Court erred in treating "the jury's verdicts of conviction as discredited by the verdicts of acquittal of other defendants" (Petition p. 16; also 2-3 and 17). In the first place, the passage of the opinion in question here was prefaced by the parenthetical limitation "In passing" as to which the foregoing principle applies. Secondly, the Appellate Court recognized the controlling rule that

> "It is true the question on review is not whether the verdict of acquittal of the individual defendants was warranted, but whether the verdict of guilty against the corporations is sustained by substantial evidence, and mere inconsistency in verdicts is not fatal" (R. 661, 178 F. 2d, l. c. 370-1).

This is as clear a phrasing of the rule announced by this Court and apparently contended for by Petitioner (Petition, p. 17) as possible. The Appellate Court merely noted

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* Webster's New International Dictionary, p. 1577: **Passing**, going by, beyond, through or away; departing.

that the inconsistency of the verdicts runs against all "logic or reason." Not even Petitioner could take issue with such a self-evident truth. The Court's remark and related comments, while illuminating, were obviously unnecessary to the holding, and therefore unimportant here.

In conclusion, it is respectfully urged that the petition for writ of certiorari to the court below be denied.

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